Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

ALTON WAYNE SMITH,

*Petitioner,*

vs.

ALABAMA AVIATION AND TECHNICAL COLLEGE, SHIRLEY WOODIE, Individually and Officially, FRED GAINOUS, Individually and Officially, and JOHN FERGUS, Individually and Officially,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Alabama Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May a state court, consistent with the Supremacy Clause and this Court's decisions in *Patsy v. Board of Regents* & *Felder v. Casey*, require litigants to exhaust inadequate administrative remedies as a condition precedent to filing a § 1983 claim?

2. If a state court may impose an exhaustion requirement on § 1983 claims, may it do so retroactively?

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## PETITION FOR WRIT OF CERTIORARI

Alton Wayne Smith respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App. A) is reported as *Alton Wayne Smith v. Alabama Aviation and Technical College, et al.*, 683 So. 2d 431, 1996 Ala. LEXIS 173. The opinion of the Alabama Court of Civil Appeals (App. B) is reported at 683 So. 2d 426, 1995 Ala. Civ. App. LEXIS 331. The opinion of the Circuit Court for Dale County, Alabama (App. D) and the determination of the administrative panel (App. E) are unreported. As indicated, the opinions are reproduced in the accompanying appendix.

## STATEMENT OF JURISDICTION

The Alabama Supreme Court released its opinion on June 28, 1996. App A. On July 11, 1996, an extension of time to file a brief supporting rehearing was granted by the Alabama Supreme Court. App J. The timely filed Application for Rehearing was denied by the Alabama Supreme Court on October 25, 1996. App. F. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Supremacy Clause, the Due Process Clause, and the Equal Protection Clause. App. H at 1-2. The federal statutes involved are 42 U.S.C. §§ 1983 & 1988. *Id.* at 2-4. Pertinent state statutory authority is set out in Appendix I, and includes the following: Ala. Code §§ 41-22-20 & 21, App. I at 1-8; Ala. Code §§ 36-26-100, *et seq.* (1987), (Alabama Fair Dismissal Act), App. I at 8-14; Ala. Code §§ 16-24-30, *et seq.* (State Tenure Commission Act), App. I at 14-20.

## STATEMENT OF THE CASE

### A. Background

After more than fourteen years of employment as an instructor in avionics with the Alabama Aviation Technical College ("AATC"), Alton Wayne Smith, a whistle blower, was given a notice of dismissal. App. B at 2; App. A at 2. Pursuant to the Alabama Fair Dismissal Act ("Act"), Ala. Code § 36-26-100-108 (1987), App. I at 8, which the Alabama Supreme Court found applicable to Smith's claims, Smith timely appealed his termination and requested a hearing before an employee review panel ("panel"). *Id.* §§ 36-26-104-105, App. I at 11-12; App. A at 9 (referring to the statutory provisions). Pursuant to § 105, a panel of three persons was selected to hear his appeal. None of the panelists was an attorney. App. A at 5.

The panel's charge was not to evaluate constitutional claims, but to "consider whether the action . . . was arbitrary or unjust or for political or personal reasons." *Id.* § 36-26-106, App. I at 12-13. The panel's decision is *"final and binding." Id.*; App. A at 8 (emphasis added). The record also reveals that prior to the administrative hearing before the panel, Smith's attorney filed an unsuccessful motion to dismiss the proceedings based on due process grounds, R-C-936-37, and one of the panelists merely read Ala. Code § 36-26-106 into the record, which he described as their "purpose." App. B at 10.

After receiving several days of evidence, the panel issued a two-paragraph determination that did not address any constitutional issue but that did uphold the Petitioner's termination. App. E. At the time of the determination, the panel was without power to hear an appeal of Smith's constitutional claims. *Ex Parte Averyt*, 487 So.2d 912, 914 (Ala. 1986). Consequently, Smith did not appeal the decision of the panel; instead, he filed a § 1983 action in the Circuit Court of Dale County, Alabama. App A. at 2-3; App. D. Upon motion, the circuit court granted summary judgment to all defendants, holding that Smith was collaterally estopped from litigating in court his free speech and equal protection claims because these issues had been decided against him by the panel. App. D.

Smith filed a timely appeal to the Alabama Court of Civil Appeals, which affirmed the summary judgment as to all defendants on the sole ground that Smith was collaterally estopped from litigating his federal constitutional claims in court. App. B at 11. A timely petition for rehearing was overruled. App. G.

### B. Proceedings Before the Alabama Supreme Court

The Alabama Supreme Court granted *certiorari*, purportedly to address the "preclusive effect of an administrative determination of a constitutional claim." App. A at 1. The sole basis for ruling against Smith, however, was that Smith failed to exhaust his administrative remedies. *See* App. A at 8. According to the supreme court, Smith possessed no § 1983 claim because "the ***only remedy available*** to Smith was to appeal the panel's decision to the appropriate circuit court." *Id.* (emphasis added).

Because the question of administrative exhaustion had not been briefed or argued in any lower tribunal, and because the supreme court did not cite *Patsy v. Board of Regents*, 457 U.S. 496 (1982), or *Felder v. Casey*, 487 U.S. 144 (1988), Smith filed for rehearing. App. K. On rehearing Smith asserted that the court's newly articulated rule violated the Supremacy Clause, App. H at 1, and the Fourteenth Amendment to the United States Constitution. *Id.* The application for rehearing was denied without opinion, App. F, and Smith has timely filed this petition.

## REASONS FOR GRANTING THE WRIT

### I. THE ALABAMA SUPREME COURT'S OPINION CONFLICTS WITH THIS COURT'S DECISIONS AND WITH THE DECISIONS OF APPROXIMATELY ONE-THIRD OF THE STATE COURTS OF LAST RESORT ON AN IMPORTANT FEDERAL QUESTION.

The exhaustion requirement enunciated by the Alabama Supreme Court stands irretrievably inconsistent with the explicit disposition of the exhaustion issue in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Felder v. Casey*, 487 U.S. 144 (1988). *Patsy* "categorically" held that § 1983 litigants are guaranteed immediate access to judicial forums without having to exhaust administrative remedies. *Patsy*, 457 U.S. at 500-01, 516. *Felder* confirmed that state courts fall squarely within the purview of *Patsy's* non-exhaustion rule. *Felder*, 487 U.S. at 148-50. The linchpin of § 1983 actions is that they "belong in court," *Felder*, 487 U.S. at 148-50, and exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. *Id.*

This Court has never suggested that a state may impose an exhaustion requirement to extinguish a § 1983 claim that would otherwise exist in federal court. Indeed, *Felder* prohibits application of a state rule where the rule conflicts with the remedial objectives of § 1983 and its enforcement will "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." *Felder*, 487 U.S. at 138; *Howlett v. Rose*, 496 U.S. 356, 377 (1990) (state courts may not frustrate or interfere with federal causes of action). Because the impropriety of state

court exhaustion requirements is so clear, this case is a prime candidate for summary reversal. Rule 16(1).

With the exception of Alabama and South Dakota, state courts of last resort that have addressed the issue have determined that federal law prohibits the imposition of exhaustion requirements in § 1983 cases. *Dep't of Health & Social Services v. Alaska State Hospital & Nursing Home Ass'n*, 856 P.2d 755, 758 (Alaska 1993) (relying on *Patsy*); *Diedrich v. City of Ketchikan*, 805 P.2d 361, 368-69 & n.13 (Alaska 1991) (*Felder* "settled this issue conclusively"); *Arkansas State Medical Bd. v. Leipzig*, 770 S.W.2d 661, 662 (Ark. 1989) (relying on *Felder*); *Brosterhous v. State Bar*, 906 P.2d 1242, 1258 (Cal. 1996) ("[W]e may not deny plaintiffs the right to a judicial action for relief in the first instance by imposing a requirement that the plaintiff initiate or exhaust state remedies before filing a section 1983 action."); *Fetterman v. Univ. of Conn.*, 473 A.2d 1176, 1181 (Conn. 1984) (rejecting argument that state courts are exempt from *Patsy*'s nonexhaustion rule for § 1983 claims and applying *Patsy*'s nonexhaustion rule to avoid a significant incongruity between state and federal § 1983 claims); *Miller v. District of Columbia*, 587 A.2d 213, 215 (D.C. App. 1991) (*Patsy's* no exhaustion rule is fully applicable to local courts of the District of Columbia); *Aged Hawaiians v. Hawaiian Homes Comm'n*, 891 P.2d 279, 289 & n.19 (Haw.) (*Patsy* and *Felder* forbid exhaustion requirements because they would "impermissibly 'adulterate or dilute the predominant feature of the federal right' ") (quoting *Felder*, 487 U.S. at 148), *cert. denied*, 116 S. Ct. 77 (1995); *Brumage v. Woodsmall*, 444 N.W.2d 68, 70 (Iowa 1989) (*Felder* prohibits exhaustion requirements); *Electro-Tech, Inc. v. H.F. Campbell, Co.*, 445 N.W.2d 61, 71, 73

(Mich. 1989) (dicta) ("*Patsy* unequivocally establishes that [Plaintiff] was not required to exhaust available administrative remedies before bringing its § 1983 claim"), *cert. denied*, 493 U.S. 1021 (1990); *Maryland Reclamation Associates, Inc. v. Hartford Co.*, 677 A.2d 567, 575 (Md. 1996) (*Felder* prohibits the imposition of exhaustion requirements on state law claims); *Rivkin v. Dover Tp. Rent Leveling Bd.*, 671 A.2d 567, 583 (N.J.) (dicta) (citing *Patsy* for the proposition that litigants need not exhaust administrative remedies prior to bringing § 1983 claims), *cert. denied*, 117 S. Ct. 275 (1996); *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1067 (N.Y. 1996) (exhaustion requirement violates *Patsy*); *Gibney v. Toledo Bd. Of Educ.*, 532 N.E.2d 1300, 1305 (Ohio 1988) (*Felder* extends beyond notice of claim provisions to prohibit all forms of state court exhaustion requirements); *Nutbrown v. Munn*, 811 P.2d 131, 136-37, 138 (Or. 1991) (dicta) (characterizing the general rule in *Felder* and *Patsy* as one forbidding exhaustion requirements in § 1983 non-tax cases), *cert. denied*, 112 S. Ct. 867 (1992); *Murtagh v. County of Berks*, 634 A.2d 179, 182-83, 185 (Pa. 1993) (finding that *Felder* and *Howlett* dictate that taxpayers may maintain a § 1983 cause of action without first exhausting statutory remedies), *cert. denied*, 114 S. Ct. 1397 (1994); *O'Connors v. Helfgott*, 481 A.2d 388, 391 (R.I. 1984) (relying on *Patsy* to conclude that exhaustion may not be required of constitutional claims asserted in state court); *Binkely v. City of Tacoma*, 787 P.2d 1366, 1376 (Wash. 1990) (acknowledging, based on *Patsy*, that exhaustion of administrative remedies is not a prerequisite to bringing a § 1983 action); *Casteel v. Vaade*, 481 N.W.2d 476, 480-81 (Wis. 1992) ("Felder . . . very strongly, convincingly, and clearly asserts that a state court may

not impose an exhaustion requirement in a § 1983 action.");[1] *see also Conley v. Massachusetts Bay Transp. Auth.*, 539 N.E.2d 1024, 1025, 1030 (Mass. 1989) (noting and implicitly approving the trial court's refusal to require exhaustion of a union grievance procedure as a prerequisite to filing a § 1983 action); *cf. Willbourn v. City of Tulsa*, 721 P.2d 803, 805 (Okla. 1986) (commenting, while addressing a notice of claim issue, that "the remedy provided by § 1983 must be independently enforceable even if a parallel state remedy is available"). *Contra Reiff v. Avon School Dist. No. 4-1*, 458 N.W.2d 358, 360-61 (S.D. 1990) (failing to discuss or cite *Felder* or *Patsy* and rejecting the availability of a § 1983 claim against a school district by a terminated employee because of the exclusivity of the state statutory method for reviewing school board decisions).

Intermediate appellate courts have with similar consistency rejected exhaustion of administrative remedies requirements in state court § 1983 actions. *See, e.g., Hall v. City of Dothan*, 539 So.2d 286, 290 (Ala. Civ. App. 1988), *overruled sub silentio, Alton Wayne Smith v. Alabama Aviation and Technical College*, 683 So.2d 431 (Ala. 1996) (App. A); *Zeigler v. Kirschner*, 781 P.2d 54, 59-60 (Ariz. Ct. App. 1989) ("the holding in *Felder* clearly demonstrates that a

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[1] *Casteele* summarized the *Felder* holding as follows:

> A state court may not require a complainant to exhaust state administrative remedies before bringing a § 1983 action in state court unless the complainant falls under a clear exception to the 'no exhaustion' rule adopted by the United States Congress.

*Casteel v. Vaade*, 481 N.W.2d 476, 481 (Wis. 1992).

state court may not condition a plaintiff's § 1983 rights upon the exhaustion of state administrative remedies"); *Bohn v. Waddell*, 790 P.2d 772, 781 (Ariz. Tax. Ct. 1990) (holding that taxpayers, under *Felder*, need not exhaust administrative remedies before invoking jurisdiction of court), *re-aff'd on other grounds*, 807 P.2d 1 (Tax Ct. 1991), *aff'd in part, rev'd in part, vacated, in part, on other grounds*, 848 P.2d 324 (Ariz. Ct. App. 1992), *cert. denied*, 509 U.S. 906 (1993); *Montoya v. City of Colorado Springs, Colo.*, 770 P.2d 1358, 1364-65 (Colo. Ct. App. 1989) (failure to appeal administrative decision is no bar to § 1983 claim); *Marker v. Talley*, 502 A.2d 972, 976-77 (Del. Super. Ct. 1985) (non-exhaustion principles apply to federal claims asserted in state court); *Howlett v. Rose*, 571 So. 2d 29, 30 (Fla. Dist. Ct. App. 1990) (on remand) (relying on *Patsy* to hold that "[e]xhaustion of state administrative remedies is not a prerequisite to an action under section 1983"); *Allen v. Bergman*, 400 S.E.2d 347, 348 (Ga. Ct. App. 1990) (*Felder* prohibits states from requiring litigants to "exhaust administrative remedies before asserting claims pursuant to 42 USC §§ 1981 & 1983 in state courts"), *cert. denied*, 1991 Ga. LEXIS 473 (Ga. Jan. 31, 1991); *Boughton & Materials, Inc. v. County of Will*, 593 N.E.2d 1119, 1123 (Ill. App. Ct. 3d Dist. 1992) (*Felder* mandates that any precondition for bringing a federal claim in state court must be "essentially the same precondition plaintiff would have to fulfill before gaining access to a federal court"); *Myers v. Moyers*, 667 N.E.2d 1120, 1123 (Ind. Ct. App. 1996) (exhaustion requirement impermissible in state court); *Eberhardt v. LeVasseur*, 630 So. 2d 844, 847 (La. Ct. App. 1993) (exhaustion not required in § 1983 action in state court); *Earle v. Gunnell*, 554 A.2d 1256, 1261 (Md. App.

1989) (same); *Strictly Pediatrics, Inc. v. Developmental Habilitation Assoc., Inc.*, 820 S.W.2d 731, 732 (Mo. Ct. App. 1991) (*Felder* put "to rest" question of whether administrative remedies need to be exhausted); *Blackwell v. City of St. Louis*, 778 S.W.2d 711, 714 (Mo. Ct. App. 1989) (rejecting application of exhaustion of administrative remedies requirement to § 1983 cases), *cert. denied*, 494 U.S. 1067 (1990); *Greene v. Cole*, 1989 Tenn. App. LEXIS 32 at **5-6 (Tenn. Ct. App. Jan. 20, 1989); *Anthony v. Indep. School Dist.*, 921 S.W.2d 800, 804 (Tx. Ct. App. 1996) (stating that *Patsy* "categorically" forbids exhaustion requirements in state court). *Contra Peterson v. City of Pocatello*, 786 P.2d 1136, 1138 (Idaho Ct. App. 1990) (dismissing police officer's § 1983 and state law claims based on a failure to exhaust administrative remedies without discussing or citing *Felder*, *Patsy*, or other federal cases).

The basis for the refusal to permit exhaustion requirements to extinguish § 1983 state court claims is succinctly described by the California Supreme Court. The court explained:

> Were we to [impose an exhaustion requirement], we would delay the time at which a section 1983 action could be brought and thus deny immediate access to the federally created right. And we would create an outcome-determinative rule that would lead to inconsistent results in state and federal section 1983 actions. Those brought in federal court could proceed regardless of whether administrative relief had been sought, but those brought in state court would be subject to dismissal unless the plaintiff not only exhausted administrative remedies, but

> followed that by seeking review of the administrative action in the state court system.

*Brosterhous v. State Bar*, 906 P.2d 1242, 1258 (Cal. 1996).

The burdensome system presaged by *Brosterhous*, which will effectively shunt § 1983 plaintiffs to federal forums, has emerged in Alabama. In addition to failing to provide a litigant with immediate access to a court, Alabama's woefully deficient statutory remedies impermissibly "adulterate [and] dilute" the federal right. *Felder*, 487 U.S. at 148. In Alabama, a "literal, narrow interpretation of the [Fair Dismissal] Act" drastically restricts the availability of administrative remedies, *Ex Parte Birmingham Bd. of Educ.*, 601 So.2d 93, 97 (Ala. 1992), and the supreme court refuses to identify any implied remedies in the statutes beyond those expressly provided by the legislature. *Id.* Thus, Alabama now requires discharged state employees who pursue administrative remedies to fully litigate their constitutional claims through an inadequate administrative process that fails to authorize any of the following: compensatory damages, punitive damages, front pay, attorney's fees, costs, expenses, or a trial of any type.

Additionally, although costs and expenses are available to prevailing parties in § 1983 actions, *see* 42 U.S.C. § 1988, App. H at 3-4, a circuit court is prohibited from awarding them under Alabama's administrative regime. *See* App. I at 13, Ala. Code § 36-26-106 (1983) ("Expenses and fees of the employee review panel shall be shared equally by the board and the employee."). Under § 1983, the parties do not "share" the seldom trivial expenses incident to a § 1983 action; rather, plaintiffs receive them

only if they are prevailing parties and defendants receive them only in extreme cases. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (describing how federal fee awards are asymmetrically distributed in favor of plaintiffs); *Walker v. Nationsbank*, 53 F.3d 1548, 1558 (11th Cir. 1995) (explaining that fees are awarded against plaintiffs only if a case is "seriously lacking in arguable merit"). It is therefore apparent that the Fair Dismissal Act's cost-sharing provision, along with the deficiencies noted above, substantively redistributes the financial risks attendant to litigating § 1983 actions. Thus, there is no question that this administrative procedure, as a precondition to suit, impermissibly serves to thwart the § 1983 remedy. For another example of interference with § 1983 actions by Alabama courts, see *Jefferson v. City of Tarrant, Ala.*, 682 So. 2d 29, 1996 Ala. Lexis 185 (Ala. Sup. Ct. 1996), *petition for cert. filed*, U.S.L.W. (U.S. Nov. 27, 1996) (No. 96-957) (barring § 1983 wrongful death claims against municipalities on the basis that Alabama does not permit the award of compensatory damages for claims of wrongful death).

## II. THE ALABAMA SUPREME COURT, BY RETROACTIVELY IMPOSING A FATAL EXHAUSTION REQUIREMENT, HAS DISREGARDED PRIOR DECISIONS OF THIS COURT AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The retroactive application of the supreme court's exhaustion rule, when used to bar Smith's claim, violates

federal due process and equal protection guarantees. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 439-42 102 S. Ct. 1148, 1154, 1160-61 (1982) ("a cause of action is a species of property"). Until the June 28 opinion, App. A, the law of Alabama for over a decade was that a circuit court, when acting as a reviewing court on appeal from an administrative decision, lacked the minimal power to even evaluate constitutional claims. *Ex Parte Averyt*, 487 So. 2d 912 (Ala. 1986). *See Joyner v. City of Bayou La Batre*, 572 So. 2d 492, 493 (Ala. Civ. App. 1990) ("Only by invoking the general jurisdiction of the circuit court, by way of a collateral suit, [not via an administrative appeal], could [plaintiff] have had his constitutional questions addressed.").

Furthermore, an Alabama circuit court could not review the constitutionality of an employee's discharge on appeal from a non-lawyer's administrative determination of its constitutionality. *Carlisle v. Phenix City Bd. of Educ.*, 849 F.2d 1376, 1381-82 (11th Cir. 1988), *op. adopted*, 543 So. 2d 194, 195 (Ala. 1989). Alabama law holds that if an administrative panel is without authority to review a constitutional issue, then the circuit court to which an appeal lies is similarly without such authority. *City of Homewood v. Caffee*, 400 So. 2d 375, 377-78 (Ala. 1981) ("Thus, if [petitioner] has valid claims not cognizable before the [administrative board], he will likewise be precluded from litigating those claims to the circuit court on appeal pursuant to [the authorizing statute].").

In *Averyt*, while ruling that the circuit court did not have authority to decide the constitutional issues implicated, the supreme court stated, "***[O]nly*** by invoking the general jurisdiction of the Circuit Court, by way of a

collateral suit, could Averyt's constitutional challenges be raised and presented for determination." *Averyt*, 487 So. 2d at 914 (emphasis added). Thus, although the opinion in this case rests solely on the purported failure of Smith to file an appeal to the circuit court for its review, App. A at 8, the circuit court was without authority to rule on the constitutional issues and the supreme court's suggested remedy did not in fact exist. Appropriately, *Averyt* had characterized the same procedural construct that was created by the supreme court's June opinion as an impermissible "Catch-22" that would result in a "miscarriage of justice." *Averyt*, 487 So. 2d at 914. Extinguishing Smith's claims because he *adhered* to *Averyt* constitutes an injustice that eviscerates fundamental Fourteenth Amendment principles.

## CONCLUSION

For all of the above reasons, the petition for a writ of certiorari to the Alabama Supreme Court should be granted.

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**APPENDIX A**

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1995-96

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Ex parte Alton Wayne Smith

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(Re: Alton Wayne Smith

v.

Alabama Aviation and Technical College, et al.)

(Dale Circuit Court, CV-93-212;
Court of Civil Appeals, 2940449)

(Filed Jun. 28, 1996)

MADDOX, Justice.

We granted certiorari review in order to address a single legal issue: The preclusive effect of an administrative determination of a constitutional claim, when the aggrieved person does not seek judicial review of the administrative decision as authorized by law.

Alton Wayne Smith was a tenured instructor at the Alabama Aviation and Technical College ("AATC"), a state institution of higher learning. In August 1991, Smith was terminated as an avionics instructor, after having served for 14 years in that position. The reasons given for his termination were violations of the sick leave policy, numerous absences from classes he was teaching, and faculty and student complaints. Smith appealed this decision to an administrative review panel, arguing, among

other things, that he had been fired for exercising his right to free speech. Specifically, Smith claimed he had been fired for voicing criticism of the institution's administration and curriculum and for writing letters to former Governor Guy Hunt complaining of what he considered to be fraudulent and wasteful practices at AATC. At the hearing conducted by the review panel, Smith raised these arguments, but was unsuccessful. The review panel found that Smith had been terminated for good cause and affirmed his termination.[1] The panel did not mention Smith's constitutional claims, apparently rejecting them. Smith did not appeal the decision of the administrative review panel to the appropriate circuit court, as allowed by § 41-22-20(k)(1), Ala. Code 1975, but instead filed this present action against AATC and three administrators.[2] In his action, he claimed damages based on alleged breach of contract, breach of an implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and retaliatory discharge, and damages based on 42 U.S.C. § 1983. Smith's § 1983 claims were based on the assertion that his termination violated his rights to freedom of speech and due process. The trial judge entered a

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[1] The decision of the review panel read in its entirety: "The Employee Review Panel has decided to uphold the termination of the employment of Mr. Alton Wayne Smith by the Alabama Aviation [and] Technical College in Ozark, Alabama.

"The panel found sufficient testimony and evidence that there were reasons for this termination of employment on the grounds of 'other good and just causes' and failure to perform duties [in] a satisfactory manner."

[2] The three administrators named in the action were Shirley Woodie, president of AATC; John Fergus, dean of instruction; and Chancellor Fred Gainous.

summary judgment in favor of the defendants on all of Smith's claims, and he appealed to the Court of Civil Appeals.

Smith raised but one issue in the Court of Civil Appeals: whether the trial court erred in dismissing his § 1983 claims against the three administrators. The Court of Civil Appeals affirmed the dismissal of the § 1983 claims, holding that they were barred by the doctrine of collateral estoppel, i.e., issue preclusion. *Smith v. Alabama Aviation & Technical College*, [Ms. 2940449, June 16, 1995] ___ So. 2d ___ (Ala. Civ. App. 1995). The Court of Civil Appeals held that the doctrine of collateral estoppel barred relitigation of Smith's claim that he had been fired for exercising his right to free speech. In determining that Smith was precluded from raising this constitutional issue, the court applied the elements for issue preclusion applicable to administrative hearings, as announced by this Court in *Ex parte Shelby Medical Center, Inc.*, 564 So.2d 63 (Ala. 1990). In that case, this Court held that for the doctrine of collateral estoppel to apply to an issue raised in an administrative proceeding, the following elements must be present:

> " '(1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.' "

564 So.2d at 68 (quoting *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985)). The Court of Civil Appeals, finding that these elements had been satisfied, ruled that Smith was precluded from raising the free speech and due process issues in his § 1983 action.

In his petition, Smith argues that the judgment of the Court of Civil Appeals is erroneous, stating that issue preclusion cannot be applied to his claim under the facts and circumstances of this case. First, Smith argues that federal law prohibits the application of issue preclusion in § 1983 actions where the issue to be precluded is one from a unreviewed decision of an administrative panel. Second, he argues that the administrative review panel, which consisted of three lay members, did not have the requisite legal competence to decide whether Smith had been terminated in violation of his constitutional rights. Third, he claims that the panel's decision did not adequately address his constitutional claims so as to preclude these constitutional issues in this subsequent action. We will address these issues in the order in which they have been presented.

Smith's initial contention is that federal law prohibits the application of issue preclusion in a § 1983 action, where the issue to be precluded has been determined by an unreviewed decision of an administrative panel and involves claims of unconstitutional termination of employment. Although Smith is correct that a federal court would not bar this claim on the grounds of issue preclusion, his argument that federal law prohibits application of collateral estoppel in this scenario is misplaced. It is well established that a federal court will not preclude litigation of constitutional issues when those issues have

been raised in an unreviewed decision of a state administrative agency. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Carlisle v. Phenix City Bd. of Educ.*, 849 F.2d 1376 (11th Cir. 1988); *Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987); *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993). *See also, McDonald v. City of West Branch*, 466 U.S. 284 (1984) (Supreme Court refused to give preclusive effect to constitutional issues raised in an unappealed arbitration decision). However, Smith is incorrect in his assertion that federal law bars the application of preclusion doctrines in these cases. The federal cases addressing this issue have not held that the United States Constitution prohibits the application of issue preclusion by a court in a subsequent action by a plaintiff who had raised the constitutional issues at an administrative hearing concerning his termination. Rather, these cases stand for the proposition that the federal common law doctrine of collateral estoppel will not be applied in federal forums when the decisions on the constitutional issues to be precluded have not been judicially reviewed. *See, e.g., Carlisle v. Phenix City Bd. of Ed.*, 849 F.2d 1376 (11th Cir. 1988). Therefore, there is no federal constitutional restraint placed on the states in regard to how they may fashion their preclusion rules in relation to this issue.

Next, Smith contends that collateral estoppel should not be applied in this action, because, he says, the administrative review panel, which consisted of three non-lawyers, did not have the requisite legal training to competently adjudicate these claims; he argues that the

decision of the panel did not adequately address these constitutional issues, so as to preclude adjudication of these issues in the subsequent action. This argument seems to mirror the rationale utilized by federal courts in holding that preclusive doctrines will not be applied to unreviewed administrative review panel decisions involving claims of unconstitutional terminations. *See, Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993). The federal cases have articulated concerns that an administrative panel is not equipped with the legal training to adequately adjudicate these issues. Although there seems to be merit in Smith's argument, especially given that Smith has averred that he was terminated for exercising his First Amendment rights, this contention is unpersuasive, considering that he did not appeal the decision of the review panel, as he was allowed to do by § 41-22-20(k)(1), Ala. Code 1975.

In support of his assertion that his constitutional claims were not "actually litigated and determined in the administrative proceedings," as required under the test announced in *Ex parte Shelby Medical Center, Inc., supra*, Smith contends that the administrative review panel was not equipped to adequately determine whether he had been terminated for exercising his right to free speech. At first glance, this argument appears to be valid. The Supreme Court of the United States has been clear in its holdings concerning the appropriate standards for determining whether a plaintiff has been unconstitutionally terminated for exercising his or her First Amendment Rights. In order for a plaintiff to prevail on such a theory, the plaintiff must show: 1) that the alleged conduct was constitutionally protected and 2) that the conduct was a

"substantial" or "motivating" factor in the review panel's decision to affirm the termination of employment. Once this standard has been met, the review panel may defeat this charge by showing that it would have affirmed the dismissal of the employee even in the absence of the protected conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). A look at this test reveals that Smith's contention that the review panel could not adequately determine his claim is correct. In the two-step test, one must determine first whether the speech is "constitutionally protected" and then determine if the speech was a "substantial" or "motivating" factor in the decision to terminate. Whether the employee has satisfied this test cannot be adequately determined by a review panel composed of three lay persons, because proper application of this test requires a legal education. In *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993), the Court of Appeals for the Third Circuit specifically addressed this issue as follows:

> "We see a profound difference in the ability of a Commission composed of lay citizens to resolve matters of credibility and fact . . . and the ability to determine the more complex question of whether [certain] statements are constitutionally protected. . . . We intimate no disrespect for the Commission in stating that constitutional adjudication is not within its competence so as to bar a federal court from reexamining that legal issue.
>
> ". . . .
>
> . . . [W]e do not think that an administrative agency consisting of lay persons has the

> expertise to issue binding pronouncements in the area of federal constitutional law."

*Edmundson*, 4 F.3d at 192-93. We agree with Smith's argument that the review panel could not adequately determine the constitutional issues presented to it and that there has been no showing that the panel did apply the required test. His § 1983 claims are nevertheless barred, because he had a right to appeal the ruling of the review panel to the appropriate circuit court, under § 41-22-20(k)(1), Ala. Code 1975, but did not do so.

Section 41-22-20 provides for a judicial review of the decisions of administrative agencies, when the decisions of such agencies are final and binding. § 41-22-20(a), Ala. Code 1975. Being a tenured instructor at AATC, Smith correctly appealed his termination to a review panel, pursuant to § 36-26-105, Ala. Code 1975, but because the decision of the review panel is considered final and binding,[3] the only remedy available to Smith was to appeal the panel's decision to the appropriate circuit court. A reviewing circuit court "may reverse or modify the decision [of an administrative review panel] or grant other appropriate relief" if it finds that "substantial rights of the petitioner have been prejudiced because the agency action is . . . [i]n violation of constitutional or statutory provisions." § 41-22-20(k), Ala. Code 1975. Smith did not appeal the decision of the review panel to the circuit court; rather, he brought this action in order to recover damages for wrongful termination. Therefore, he waived his right to appeal the decision of the review panel.

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[3] § 36-26-106, Ala. Code 1975.

If he had appealed the decision of the review panel to the appropriate circuit court, Smith could have ensured that his constitutional claims would be properly adjudicated. In reviewing a claim that an employee has been terminated for exercising the right to free speech, an appellate court must make an independent examination of the whole record, in order to ensure that the judgment of an administrative review panel does not constitute a forbidden intrusion on the field of free expression. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). This is a rule of Federal constitutional law, reflecting the conviction that judges must exercise independent review in order to preserve these liberties, and this rule is binding upon state appellate courts. *Bose Corp.*, 466 U.S. at 510. Therefore, a circuit court, acting in an appellate capacity, would be required to make a *de novo* review of any First Amendment claims raised by the terminated employee. Thus, there is an appropriate procedure for an employee to follow in order to ensure that his or her constitutional claims are reviewed by a jurist possessing the requisite legal competence.

These appellate procedures ensure that the aggrieved employee will have the opportunity to raise his or her constitutional claims in a court of law, where such claims will be determined by a person having the requisite legal competence. Smith did not pursue his statutory remedy by appealing the ruling of the administrative review panel. His failure to appeal the ruling of the review panel to the appropriate circuit court acts as a waiver of any right to relitigate these issues, because the circuit court could have adequately determined the constitutional issues raised by him.

Smith's request that this Court adopt the federal view of issue preclusion in this situation is unpersuasive. The doctrines of collateral estoppel and res judicata are applied to encourage judicial economy by allowing issues, including constitutional issues, to be decided in a single proceeding, so that there can be a final resolution of the conflict between the parties. Failure to apply these doctrines would frustrate the purposes of the Alabama Rules of Civil Procedure, which are designed "to secure the just, speedy and inexpensive determination of every action" on its merits. Rule 1(c), Ala. R. Civ. P.

Under the provisions of law, an aggrieved person, such as Smith, who believes that the decision of a review panel did not adequately or correctly adjudicate his or her constitutional claims can appeal that decision to the appropriate circuit court, as provided in § 41-22-20, Ala. Code 1975. To allow a plaintiff to raise the same issues in a subsequent lawsuit after having elected not to appeal from the administrative ruling would frustrate efforts to provide an orderly administration of justice and could encourage one to relitigate issues rather than have those issues finally resolved.

Based on the foregoing, we affirm the judgment of the Court of Civil Appeals.

AFFIRMED.

Hooper, C.J., and Shores, Houston, Kennedy, Ingram, and Cook, JJ., concur.

## APPENDIX B

(Released Jun 16, 1995)

## ALABAMA
## COURT OF CIVIL APPEALS

OCTOBER TERM, 1994-95

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2940449

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Alton Wayne Smith

v.

Alabama Aviation & Technical College, et als.

Appeal from Dale Circuit Court

(CV-93-212)

ROBERTSON, Presiding Judge.

Alton Wayne Smith appeals from a summary judgment entered in favor of the Alabama Aviation and Technical College (AATC), Dr. Shirley Woodie (President of AATC), John Fergus (Dean of Instruction at AATC), and Fred Gainous (Chancellor of the Post-Secondary Division of the Department of Education of the State of Alabama). We affirm.

The record reveals the following facts. Alton Wayne Smith was a tenured professor of avionics at AATC, a public, two-year technical college governed by the State Board of Education. The Chancellor, the chief executive officer of the State of Alabama Post-Secondary Education Division, is the immediate supervisor of the various two-year college presidents. § 16-60-110 *et seq.*, Ala. Code 1975. On August 15, 1991, Smith received a letter from Dr.

Shirley Woodie, President of AATC, which informed him of Woodie's intent to terminate his employment with AATC. The basis for Smith's termination was: his violation of the sick leave policy for the week of July 1, 1991, the week of July 8, 1991, July 19, 1991, and August 12, 1991; his failure to satisfactorily and appropriately carry out his teaching responsibilities; and the negative impact his conduct had had upon the education process and employee morale. On August 28, 1991, Smith received a second letter from Woodie officially terminating his employment with AATC effective August 31, 1991.

Pursuant to the "Revised Hearing Procedure" regulations of the State Board of Education, Smith properly requested a review of his termination by a three-member employee review panel. At the hearing conducted by the employee review panel, all parties were present and represented by counsel. The first day of the hearing before the panel was on October 26, 1991. On that date, the panel stated the following as their purpose:

> "[I]n making its decision the panel shall consider whether the action of the president or the administrative staff was arbitrary or unjust or for political or personal reasons on the part of the president or his staff. And, whether the president's action was warranted based upon the facts of the case and the employment record of the employee. The decision of the panel shall be final and binding upon the parties."

The panel heard testimony on October 26 & 28, 1991, and also on November 3, 1991. The testimony presented to the panel was extensive. In support of AATC and Woodie's claims that Smith was fired for "just cause," there was testimony by Fergus and Woodie, as well as other AATC

employees, that Smith had knowingly and continually violated the sick leave policy. Additionally, there was testimony by numerous students, their parents, and teachers at AATC, that Smith was often absent from class, that he showed little regard for the students' questions, that he offered little guidance concerning the contents of upcoming examinations, and that he failed to properly cover the necessary material in order for the students to progress to the next class level. During the Fall 1990 registration period, Smith's previous students, "in mass", refused to register unless they were assured that someone other than Smith would be their instructor. The student complaints regarding Smith's class instruction continued, and on July 19, 1991, the students delivered a written petition to Fergus listing their specific complaints. The petition was signed by all 14 of Smith's students at that time.

In response to Smith's claims that he was terminated in violation of his right to free speech and in violation of his due process rights, there was testimony presented that Woodie had reprimanded other employees when they had violated the sick leave policy by taking sick leave without prior approval. There was also testimony by an avionics instructor at AATC, Mr. Davenport, that when he had attempted to complain to Woodie about things Smith had done prior to Woodie becoming president, Woodie told him not to tell her about the past, because she wanted to treat all employees based upon their present and future job performance.

Smith presented testimony from several of his former students regarding his teaching ability, all of whom testified that Smith was a good instructor. However, the former students had had Smith in 1981, 1986, and 1987. Smith also presented testimony from three people he had worked with at AATC. However, none of the three were instructors in the avionics department and none had observed Smith's classroom instruction.

The panel rendered the following decision on November 7, 1991:

> "The employee review panel has decided to uphold the termination of the employment of Mr. Alton Wayne Smith by the Alabama Aviation and Technical College in Ozark, Alabama.
>
> "The panel found sufficient testimony and evidence that there were reasons for this termination of employment on the grounds of 'other good and just causes' and failure to perform duties in a satisfactory manner."

Smith did not appeal from the panel's decision.

On August 25, 1993, Smith filed a complaint in the Dale County Circuit Court against AATC, Woodie, and other fictitious defendants. The complaint alleged that Smith's termination from AATC constituted a breach of contract, a breach of the implied covenant of good faith and fair dealing, an intentional infliction of emotional distress, and a retaliatory discharge. On September 24, 1993, AATC and Woodie filed an answer and numerous affirmative defenses.

Smith's original attorney withdrew on October 1, 1993, and was replaced by new counsel. On November 8,

1993, an amended complaint was filed adding Fred Gainous and John Fergus as defendants. The amended complaint also added claims arising under 42 U.S.C. § 1983 for violations of Smith's First Amendment right to free speech and Smith's Fourteenth Amendment right to equal protection, and a claim for conspiracy. AATC, Woodie, and Gainous answered the amended complaint on November 18, 1993. On December 20, 1993, AATC, Woodie, and Gainous filed a joint motion to dismiss or in the alternative a motion for summary judgment. On January 20, 1994, Smith's second attorney filed a motion to continue the February 14, 1994, hearing on the motion for summary judgment. On March 3, 1994, Fergus filed an answer to the amended complaint and a motion to dismiss or in the alternative a motion for summary judgment.

The February 14, 1994, hearing on the motions for summary judgment was continued to March 14, 1994. While Smith's second attorney withdrew and was officially replaced by a third attorney on May 9, 1994, a motion to continue the March 14, 1994, summary judgment hearing was filed by Smith's third attorney on March 8, 1994. That motion was granted and the hearing was continued until July 25, 1994. On July 25, 1994, neither Smith nor his attorney appeared at the summary judgment hearing. The trial court entered a summary judgment for the defendants on August 12, 1994, holding that: all state claims against AATC and Woodie, Fergus, and Gainous in their official capacities were due to be dismissed because of the immunity provided in Article 1, § 14 of the Alabama Constitution of 1901; that all federal claims against AATC were due to be dismissed because

AATC was not a suitable "person" under 42 U.S.C. § 1983; that all claims were barred by the administrative process; that the § 1983 claims were barred by the statute of limitations; and that Smith had failed to state a valid claim under § 1983.

On September 12, 1994, Smith filed a motion to vacate or set aside the judgment, or in the alternative for a new trial. As grounds for this motion, Smith alleged that he did not receive notice of nor have the opportunity to be heard at the summary judgment hearing conducted by the trial court on July 25, 1994; that his complaint set forth a claim for relief under § 1983; and that the facts before the trial court created a genuine issue of material fact. While Smith claimed that he did not receive notice of the summary judgment hearing, the circuit court's case action summary sheet indicates that on June 21, 1994, notice was sent to Smith's third attorney regarding the hearing on July 25, 1994. On October 25, 1994, the trial court denied Smith's motion, finding that it had not erred in granting defendants' motions for summary judgment.

On December 2, 1994, Smith, who is now represented by a fourth attorney, appealed, raising the following issues: (1) whether the state law immunities, provided in Article 1, § 14 of the Alabama Constitution of 1901, as relied on by the defendants in the trial court also provides immunity against the 42 U.S.C. § 1983 federal claims; (2) whether Smith was collaterally estopped by the employee review panel hearing from bringing an independent action to enforce his federal constitutional rights; (3) whether the statute of limitations barred the federal claims filed on November 8, 1993; and (4) whether

the acts alleged in the complaint were under "color of state law."

Smith did not appeal the entry of the summary judgment for the defendants on the claims of breach of contract, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, or retaliatory discharge. Smith also did not appeal the entry of the summary judgment for AATC on the 42 U.S.C. § 1983 claims. Therefore, the remaining defendants on appeal are Woodie, Gainous, and Fergus.

An appellate court reviewing a summary judgment employs the same standard utilized by the trial court. *Southern Guaranty Ins. Co. v. First Alabama Bank*, 540 So. 2d 732 (Ala. 1989). A summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c)(3), Ala. R. Civ. P. Like the trial court, the appellate court views the evidence and resolves all reasonable doubts in favor of the nonmovant. *Specialty Container Mfg., Inc. v. Rusken Packaging, Inc.*, 572 So. 2d 403 (Ala. 1990).

When a party opposing a motion for summary judgment offers no substantial evidence to contradict that presented by the movant, the trial court must consider the movant's evidence uncontroverted. *Shows v. Donnell Trucking Co.*, 631 So. 2d 1010 (Ala. 1994). However, even when the evidence is uncontroverted, the movant must still be entitled to a judgment as a matter of law. In this case, Smith failed to offer evidence to contradict the

factual evidence presented by the defendants. Therefore, our review is limited to the evidence presented by the defendants to determine whether the defendants were entitled to a judgment as a matter of law. *Guess v. Snyder,* 378 So. 2d 691 (Ala. 1979).

We find the dispositive issue to be whether Smith was collaterally estopped from bringing an independent action to enforce his federal constitutional rights.

For the doctrine of collateral estoppel, i.e. issue preclusion, to apply to administrative proceedings, the following elements must be present:

> "(1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision."

*State Health Planning & Development Agency v. AMI Brookwood Medical Center,* 564 So. 2d 54, 59 (Ala. Civ. App. 1989) (quoting *Pantex Towing Corp. v. Glidewell,* 763 F.2d 1241, 1245 (11th Cir. 1985)).

In this case, all five elements are satisfied. First, there must be an "identity of the parties or their privies" between the administrative proceeding and this action. Smith and AATC, as well as Woodie, Fergus, and Gainous as AATC's privies, were all party to the hearing before the employee review panel. Likewise, they are all parties in this action. Therefore, the first element is satisfied.

Second, there must be an "identity of issues." Smith contested his termination from AATC and a hearing was held by a three-member employee review panel. At that review hearing, Smith claimed that he was not terminated because of his alleged violations of the sick leave policy or his alleged behavior, but rather because he had exercised his right to free speech in criticizing AATC and its policies, and because he had filed a claim for relief with the State Board of Adjustment. In this action, Smith claims that he was terminated from AATC in violation of his right to free speech and equal protection under the First and Fourteenth Amendments. In both instances, Smith was contesting his termination on the basis that he was terminated in violation of his right to free speech and his right to equal protection. Therefore, the second element is satisfied.

Next, the parties must have had an adequate opportunity to litigate the issues in an administrative proceeding, and the issues to be estopped must have been actually litigated and determined in an administrative proceeding. The panel heard testimony from 17 witnesses over a three-day period which resulted in over eight hundred pages of transcript.

During the review hearing, Smith testified on his own behalf that his employment with AATC was terminated because he had exercised his right to free speech. Specifically, Smith testified that in May or June 1991, he wrote then Governor Guy Hunt a letter regarding fraudulent and wasteful practices at AATC. After Woodie obtained a copy of the letter, she called Smith into her office and told him that he was a "trouble maker" and that writing politicians was not part of his job. Smith also

testified about a letter he had written to Mr. Tyson, a member of the State Board of Education. Smith further testified that when Woodie obtained a copy of this letter, she called him into her office and told him that if he wanted to keep his job, then he had better write a second letter saying that "everything was okay at this time." Smith testified that his request to attend an Alabama Education Association conference in August 1991 had been denied because AATC and Woodie did not want him attending "those" meetings; that his request for a personal leave day on August 15, 1991, to meet with his attorney had been denied; that other employees had been able to obtain sick leave with "no questions asked"; and that it had been difficult for him to obtain leave for any reason during the past year.

From the testimony before the panel, it is evident that Smith had an adequate opportunity to litigate the same issues he raises on appeal in the administrative proceeding, and that those issues were actually litigated and determined in the administrative proceeding. Therefore, the third and fourth elements are satisfied.

Finally, the findings on the issues to be estopped must have been necessary to the administrative decision. At the beginning of the review hearing, the panel stated that their purpose was to determine whether Smith's termination was "arbitrary or unjust or for political or personal reasons. . . . " In order to make a determination of whether Smith's termination was for political or personal reasons, it was necessary for the panel to consider Smith's testimony that he was terminated in violation of his right to free speech and his right to equal protection. The panel held that Smith was terminated on the grounds

of "other good and just causes," and "failure to perform duties in a satisfactory manner." Smith *did not appeal* from that decision.

Smith alleges that his § 1983 claims are not precluded by the panel's decision because their holding did not specifically address the issues involving the § 1983 claims. However, because the panel's purpose was to determine whether Smith's termination was "arbitrary or unjust or for political or personal reasons," we find that it was necessary for the panel to consider Smith's § 1983 claims in making their decision.

Smith also alleges that his claims are not precluded because of *Ex parte Averyt*, 487 So. 2d 912 (Ala. 1986). We find this case inapplicable to Smith's argument because in *Averyt*, the employee did not raise his federal claims in the administrative proceeding before the personnel board. That is not the case here.

Because all five elements for collateral estoppel are present in this case, we hold that Smith was estopped from bringing this action in the circuit court. Consequently, the summary judgment entered by the trial court in favor of the defendants is due to be affirmed.

AFFIRMED.

Thigpen, Yates, and Monroe, JJ., concur.

Crawley, J., recuses.

## APPENDIX C

## IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA

| | | |
|---|---|---|
| ALTON WAYNE SMITH, Plaintiff, | ) | |
| vs. | ) | CIVIL ACTION NO. 93-212-M |
| ALABAMA AVIATION AND TECHNICAL COLLEGE, et al., Defendants. | ) | |

## ORDER

This case is before the Court on Motions to Dismiss or, in the Alternative, Motions for Summary Judgment filed by Defendants Alabama Aviation and Technical College, Shirley Woodie, Fred Gainous and John Fergus. The Court has considered said motions, together with the pleadings in the instant case, undisputed factual evidence, memorandum briefs and affidavits submitted in support of said motions, and oral argument presented by counsel for Defendants in open court on July 25, 1994. For the reasons set forth in the Court's Memorandum Opinion, the Court hereby GRANTS said motions, and hereby enters SUMMARY JUDGMENT on behalf of Defendants Alabama Aviation and Technical College; Shirley Woodie, individually and in her official capacity as President of Alabama Aviation and Technical College; Fred Gainous, individually and in his official capacity as Chancellor of the Alabama Department Postsecondary Education; and John Fergus, individually and in his official capacity as Dean of Instruction at Alabama Aviation and Technical

College. Civil Action No. 93-212-M and all claims contained in the Plaintiff's Complaint and amendments thereto, are hereby DISMISSED WITH PREJUDICE as against all Defendants. Costs are hereby taxed against the Plaintiff.

DONE and ORDERED this 11 day of August, 1994.

/s/ P. Ben McLauchlin, Jr.
P. Ben McLauchlin, Jr.
CIRCUIT JUDGE

## APPENDIX D

## IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA

| | | |
|---|---|---|
| ALTON WAYNE SMITH, Plaintiff, | ) | |
| vs. | ) | CIVIL ACTION NO. 93-212-M |
| ALABAMA AVIATION AND TECHNICAL COLLEGE, et al., Defendants. | ) | |

## MEMORANDUM OPINION

This case is now before this Court on Motions to Dismiss or, in the Alternative, Motions for Summary Judgment filed by Defendants Alabama Aviation and Technical College (sometimes referred to hereinbelow as "AATC"), Dr. Shirley Woodie, Dr. Fred Gainous, and Dr. John Fergus. For the reasons discussed below, the Court concludes that SUMMARY JUDGMENT, in favor of Defendants Alabama Aviation and Technical College, Shirley Woodie, Fred Gainous and John Fergus, and against Plaintiff Alton Wayne Smith, is due to be GRANTED.

### I. THE PARTIES

#### A. The Plaintiff

The Plaintiff Alton Wayne Smith is a former avionics instructor at Alabama Aviation and Technical College.

B. The Defendants

The Defendants in this case are Alabama Aviation and Technical College ("AATC"), a State of Alabama institution of postsecondary education; Shirley Woodie, individually and in her official capacity as President of Alabama Aviation and Technical College; Fred Gainous, individually and in his official capacity as Chancellor of the Alabama Department of Postsecondary Education; and John Fergus, individually and in his official capacity as Dean of Instruction at Alabama Aviation and Technical College. The Plaintiff included in the style of the original Complaint a reference to "John and Jane Doe's 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, whose true identities are otherwise unknown to the Plaintiff at the time of the filing of the Complaint. . . . " Inasmuch as the Plaintiff has failed to substitute names of actual persons for the fictitious names of John Doe and Jane Doe, the Court shall assume that no such substitution would have been forthcoming. In the event that the Plaintiff would intend to argue that the names of Fred Gainous and John Fergus are in substitution of the fictitious names, the Court would find otherwise. The Court will not find that Mr. Smith, as a tenured instructor at AATC, would not have known the true identity of the Dean of Instruction of AATC or the Chancellor of the Alabama two-year college system.

## II. THE COMPLAINT

A. The Complaint as Originally Filed

The original Complaint, filed on August 25, 1993, named AATC and Shirley Woodie as Defendants and contained four counts. Count One was a count of breach

of contract in which it was alleged that "the defendants breached their contract with the plaintiff and that his employment was terminated without just cause." The Plaintiff alleged in Count One that the Defendants breached the Plaintiff's employment contract in that the "plaintiff's employment was terminated and procedures provided by the written contract were not followed."

Count Two of the Complaint alleges "breach of implied covenant of good faith and fair dealing." In Count Two, the Plaintiff alleges that the "defendant employer" owed the Plaintiff the duty to act in good faith and to deal fairly with the Plaintiff. The Plaintiff further alleges that the "defendant employer breached this duty of good faith and fair dealing by not acting fairly and in good faith in the termination of the Plaintiff's employment."

In Count Three of the Complaint, the Plaintiff alleges intentional infliction of emotional distress and claims that "in connection with the termination of Plaintiff's employment, Shirley Woody [sic] and various defendants acted in extreme and outrageous manner in their conduct of terminating the Plaintiff."

Count Four of the Complaint is a claim of retaliatory discharge in which the Plaintiff alleges that the *"sole reason"* (emphasis added) that the Plaintiff was discharged was because he had filed "a claim with the Alabama Board of Adjustment for on-the-job injuries received as a result of an altercation on defendant's place of employment."

B. The Amendment of Complaint

On November 8, 1993, the Plaintiff filed an Amendment to Complaint in which he added four new counts and named Fred Gainous and John Fergus as additional Defendants. The first Count of the Amendment was designated as "Count IV" and alleged that the Defendants were liable to the Plaintiff under 42 U.S.C. §1983 because they violated the Plaintiff's First Amendment right of free speech.

In Count V of the Amendment to Complaint, the Plaintiff alleged that the Defendants were liable to him under 42 U.S.C. §1983 because they violated his Fourteenth Amendment equal protection rights.

Count VI of the Amendment to Complaint is a count of conspiracy in which the Plaintiff alleges that the Defendants "conspired, contrived and combined to damage him, to deprive him of his lawful employment, to breach his contract of employment and to cause extreme emotional distress by terminating the Plaintiff from his employment and by perpetuating his termination using contrived charges to circumvent their true purpose; i.e., to force him to quit expressing his opinions and voicing his opposition to various wasteful and/or fraudulent practices of the defendants."

What is entitled "Count VII" of the Amendment to Complaint is not in reality a "count", but is a prayer for relief. The relief which the Plaintiff seeks in Count VII as well as Counts One through VI includes reinstatement of employment, back pay, the enjoinment of the Defendants from interfering with the Plaintiff's right of free speech, and the sum of $2,000,000.00 plus costs and attorney's fees.

## III. DEFENSES PRESENTED

### A. State Immunity

In defense of the claims made by the Plaintiff, the Defendants each assert immunity under Section 14 of the Constitution of Alabama 1901. The Defendants argue that because of the fact that Alabama Aviation and Technical College is a State-owned and State-operated institution of postsecondary education, it is absolutely immune from prosecution of the Compliant and of the Amendment to Complaint brought by the Plaintiff in this case. With respect to Dr. Woodie, Dr. Gainous, and Dr. Fergus, it is asserted that each of them is immune from prosecution, in their respective official capacities, under Section 14 of the Constitution of Alabama 1901.

### B. Federal Immunity

The Defendants also seek immunity from the claims brought by the Plaintiff pursuant to 42 U.S.C. §1983, in that the College is not a suable "person" for purposes of Section 1983 and that Dr. Gainous, Dr. Woodie, and Dr. Fergus are each immune from prosecution of the Federal claims in their respective official capacities by virtue of the Eleventh Amendment to the United State[s] Constitution.

### C. Statute of Limitations

Each of the Defendants asserts that the claims brought under 42 U.S.C. §1983 are barred by the applicable statute of limitations. The Defendants submit that a two-year statute of limitations applies to the Federal claims brought by the Plaintiff, and that the Plaintiff's

Federal claims were not filed until November 8, 1993, which would have been more than two years after the alleged improper acts.

D. Failure to State a Valid Federal Claim

The Defendants assert that the Plaintiff failed to sufficiently state a valid cause of action under 42 U.S.C. §1983 due to the omission of any evidence or allegation of "state action."

E. Failure to State a Valid State Claim of Breach of Contract

The Defendants submit that there can be no valid State claim arising from breach of contract as described by the Plaintiff because (1) AATC is immune from such a claim and (2) none of the other Defendants was a party to the Plaintiff's employment contract.

F. Preclusion

It is argued by the Defendants that the Plaintiff's extensive and comprehensive administrative appeal of his termination from employment at AATC was of such a nature that it precludes the civil claims brought by the Plaintiff.

G. Lack of Causal Relationship

The Defendants argue as to the various tort claims by the Plaintiff that the Plaintiff has failed to properly substantiate causal relationships between any act or omission

by each Defendant and the damage allegedly suffered by the Plaintiff.

H. Unenforceable Claim of Retaliatory Discharge

The Defendants assert that the Plaintiff's claim of "Retaliatory Discharge" is not recognizable by the Courts of Alabama.

I. Various Other Defenses

Various other defenses regarding allegations against specific Defendants were also included in the Defendants' Answers to the Complaint, as amended.

## IV. FINDINGS OF THE COURT

A. Alabama Aviation and Technical College is Immune from All State Claims

It is undisputed that Alabama Aviation and Technical College is a postsecondary education institution owned and operated by the State of Alabama. The College operates under the management and control of the State of Alabama Board of Education pursuant to Chapter 60, Title 16 of *Code of Alabama* (1975). As such an institution of the State, Defendant Alabama Aviation and Technical College is absolutely immune from prosecution of the Complaint and Amendment brought by Plaintiff Alton Wayne Smith in the instant case.

Article I, Section 14 of the Constitution of Alabama 1901 provides that "the State of Alabama shall never be made a defendant in any court of law or equity." A long

line of appellate decisions has established that for the purposes of Section 14, State educational institutions are considered to be the "State" and are thus immune from prosecution in State Circuit Court. See, for example, *Taylor v. Troy State University*, 437 So.2d 427 (Ala. 1983); *Hutchinson v. Board of Trustees of University of Alabama*, 288 Ala. 20, 256 So.2d 281 (1971); *Harmon v. Alabama College*, 235 Ala. 148, 177 So. 747 (1937); *Sarradett v. University of South Alabama*, 484 So.2d 426 (Ala. 1986).

Therefore, all State claims made against Defendant Alabama Aviation and Technical College in this action are due to be dismissed.

B. Alabama Aviation and Technical College is Not a Suable "Person" for the Purposes of 42 U.S.C. §1983

Section 1983 of Title 42 of the *U.S. Code* is the provision by which Federal actions may be brought in Federal or State court against any "person" who has allegedly, under color of state law, deprived the respective plaintiff of a Federally protected constitutional or statutory right or privilege. However, it has been established by the United States Supreme Court that a state is not a "person" for the purposes of Section 1983, and, therefore, neither a state, *per se*, nor any agency or institution thereof can be sued under Section 1983. In particular, the Supreme Court has explained that the states are protected from Federal civil actions by the Eleventh Amendment to the United States Constitution unless said immunity is specifically abrogated by the Congress. *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304

(1989); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Queen v. Jordan*, 440 U.S. 332 (1979).

C. All Claims Brought by the Plaintiff are Precluded by the Administrative Process by which the Plaintiff's Termination was Appealed

The lawsuit before the Court is one arising from the termination of the employment of Plaintiff Smith as an avionics instructor at Alabama Aviation and Technical College. It is undisputed that after receiving written notice from Defendant Shirley Woodie, President of AATC, of the termination of his employment, Defendant Smith requested and received a full administrative hearing on the matter of the termination. The hearing was available to Mr. Smith under the *Revised Hearing Procedure* of the State Board of Education. The hearing was conducted by a three-person panel, one member of which was selected by Alabama Aviation and Technical College and one by the Plaintiff. The third panel member was selected from a list of three qualified nominees provided by the Probate Judge of Dale County.

The termination hearing, which was held during portions of three different days, and the transcript of which is on file with the Court, provided Plaintiff Smith with an adequate opportunity to challenge each of the reasons given by Defendant Woodie for his termination and to submit any evidence which Mr. Smith might have chosen to present in support of any assertion that his termination was for any improper reason. Specifically, the *Revised Hearing Procedure*, at Section 8, charged the panel that "in making its decision, the panel shall consider whether the

action of the President or administrative staff was arbitrary or unjust or for political or personal reasons on the part of the President or his staff and whether the President's action was based upon the facts of the case and the employment record of the employee."

During the hearing, the panel considered oral and documentary testimony from approximately fifty witnesses, including Mr. Smith. Plaintiff Smith's defense and testimony at the hearing included challenges to the accuracy of the charges made against him, contentions that his conduct was not inappropriate, and allegations that he had been fired for exercising his First Amendment right of free speech in criticizing various people, policies, or events at Alabama Aviation and Technical College. Mr. Smith also argued that he was fired for filing a State Board of Adjustment Claim against Alabama Aviation and Technical College.

After concluding the hearing, the panel issued a *unanimous* decision upholding the termination of Mr. Smith's employment as being for good and just cause and not for personal or political reasons, and not being arbitrary or capricious.

The Court finds that the aforedescribed administrative review process is preclusive as to Plaintiff Smith's civil claims brought in the instant case. It is clear from the record of the administrative hearing that Mr. Smith had adequate opportunity to argue, and did extensively argue, that his employment at Alabama Aviation and Technical College was improperly terminated because of his exercise of Federally-protected speech and/or in retaliation of his filing a claim against Alabama Aviation and

Technical College. Furthermore, he had adequate opportunity to argue that his termination was for any other improper reason.

In *State v. Brooks,* the Alabama Supreme Court, in reversing a trial court's finding contrary to an order of a state administrative body (the State Board of Compromise), stated that:

> "It is an accepted principle that 'The rule which forbids the reopening of a matter once judicially determined by a competent authority applies as well to the judicial and quasi-judicial acts of public, executive, or administrative officers and boards acting within their jurisdiction as to the judgments of courts having general judicial powers.' 50 *C.J.S., Judgments,* §690, page 148. Furthermore, 'When the record discloses that the fact on which the jurisdiction depends has been ascertained the determination is res judicata and cannot be questioned.' *Baldwin v. State, supra,* 190 Ala. App. 379, 97 So. 467, 469. Of course we are not considering the right of review as where certiorari has issued to make a limited review of the quasi judicial acts of an administrative board. *Baker v. Denniston-Boykin Co.,* 245 Ala. 407, 17 So.2d 148. Nor is the effort here to impeach for fraud the order of the Board of Compromise by a bill in the nature of a bill of review. *Hooke v. Hooke,* 247 Ala. 450, 25 So.2d 33."

In the case of *State Health Planning and Developing Agency v. AMI Brookwood Medical Center,* 564 So.2d 54, 59, the Alabama Court of Civil Appeals stated the requirements that a party to a civil action must meet in order to sustain the defense of administrative collateral estoppel:

> "(1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision." *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985).
>
> "In order to sustain a plea of res judicata, the following elements must be met: '(1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits.' *Wheeler v. First Alabama Bank*, 763 So.2d 1190, 1199 (Ala. 1978)."

As noted above, there are five elements which must be present in order to sustain the defense of collateral estoppel based upon an administrative proceeding. These elements must be present whether the claims made are based on State law or Federal law. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). This Court finds that all five elements are present with respect to the prior administrative hearing on the claims made by Plaintiff Smith in this action and, thus, the Complaint and Amendment to Complaint are due to be dismissed as being collaterally estopped from prosecution in this Court.

D. The Claims Asserted Under 42 U.S.C. § 1983 are Barred by the Applicable Statute of Limitations

The claims brought by Plaintiff Smith under 42 U.S.C. § 1983 are those stated in his Amendment to Complaint. The Court finds that the Section 1983 claims made in the Amendment to Complaint are barred by the applicable two-year statute of limitations. It is the law in Alabama that a claim brought under Section 1983 must be brought within two years of the occurrence upon which the claim is based. *Holland v. Barton,* Ala. Lexis 1147 (Ala. 1992); *Free v. Granger,* 887 F.2d 1552, N.1 (11th Cir., 1989); *Jones v. Preuit & Mauedin,* 876 F.2d 1480 (11th Cir. 1989). Inasmuch as the Amendment to Complaint was filed on November 8, 1993 concerning a termination which occurred on August 31, 1991, and of which written notice was received by Mr. Smith on August 28, 1991, the Court finds that the claims submitted under Section 1983 are barred by the applicable two-year statute of limitations period.

While the Plaintiff might, but did not, argue that the Section 1983 claims "relate back" to the State claims made in the original Complaint on August 25, 1993, the Court finds that there was no relation back between the Federal Constitutional claims made in the Amendment to Complaint and the breach of contract and other claims brought in the original Complaint. Therefore, Cou[n]ts IV - VII of the Amendment to Complaint are dismissed as being not timely filed.

E. The Addition to the Federal Claims of Defendants Fred Gainous and John Fergus is Barred by the Applicable Statute of Limitation

As with the claims brought under Section 1983 against Defendants Alabama Aviation and Technical College and Woodie, all claims, both State and Federal, except for breach of contract and breach of implied covenant of good faith, brought against Defendants Gainous and Fergus are precluded as untimely, inasmuch as neither Gainous nor Fergus was named as a defendant until November 8, 1993, which was after the expiration of the two-year statute of limitations period applicable to all the Plaintiff's claims except those in the nature of a breach of contract action.

F. Section 14 Immunity Applies to Defendants Woodie, Gainous, and Fergus in Their Official Capacities

As previously explained, Article I, Section 14 of the Constitution of Alabama 1901 grants immunity to the State from prosecution in State Court. While there are certain exceptions to absolutely [sic] immunity of State officials, as compared to State institutions, the Plaintiff has not brought a claim against any of the Defendant officials under any of the six recognized exceptions: (1) actions to compel officials to perform their legal duties; (2) actions to prevent enforcement of an unconstitutional law; (3) actions to compel officials to perform ministerial acts; (4) declaratory judgment action seeking construction of a statute; (5) inverse condemnation actions; and (6)

actions where it is alleged that an official acted fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law.

Moreover, it has been established that when a suit is brought against a State official in such a manner as to be in effect a suit against the "State", then the official is to be considered immune from the suit. *Aland v. Graham*, 287 Ala. 226, 250 So.2d 677 (1971); *Ex parte Carter*, 395 So.2d 65 (Ala. 1980); *Stark v. Troy State University*, 437 So.2d 427 (Ala. 1983).

For the foregoing reasons, Defendants Woodie, Gainous, and Fergus are due to be dismissed as immune to the extent that they are being sued in their respective official capacities.

G. Plaintiff Fails to State a Valid Claim under Section 1983

In their motions for summary judgment, the Defendant[s] argue that the Complaint, as amended, fails to state a valid claim under the First or Fourteenth Amendment in that the Plaintiff fails to allege that any Defendant acted "under color of state law." Such an allegation is absolutely necessary to sustain a cause of action under 42 U.S.C. §1983. In addition, Count V (the Fourteenth Amendment claim) fails to state an actionable claim because Count V fails to include even any allegation of fact sufficient to show unequal treatment contrary to Federal law. As persuasively argued by the Defendants in their brief, Plaintiff Smith failed to "define a proper comparative group" and, then, failed to sufficiently state a claim of unequal treatment.

In view of the foregoing, the Court finds that the Plaintiff has failed to state a valid claim under Section 1983 against any of the Defendants.

H. The Breach of Contract Claim Cannot Lie Against Any of the Defendants

Inasmuch as the Court finds that the Plaintiff's employment contract was with AATC, and AATC alone, the Court finds that no breach of contract action can be sustained against Dr. Woodie, Dr. Gainous, or Dr. Fergus. Dr. Gainous is obviously not an agent of the employing entity. While Dr. Fergus has the authority to make recommendations to President Woodie regarding appointments, promotions, terminations, etc., he has no authority whatsoever to bring about such personnel actions. Only Dr. Woodie can be rationally argued to be the agent of AATC for the purposes of the employment or termination of AATC employees. That authority, however, does not make Dr. Woodie a contracting party with the Plaintiff.

Only AATC can be found to be the former employer of Plaintiff Smith. AATC, however, is immune under Section 14 of the Constitution of Alabama 1901 from the prosecution of a breach of contract or improper discharge claim in this Court. Therefore, the Court finds that the Plaintiff's breach of contract claims are due to be dismissed.

I. Defendant Gainous is not Alleged in Any of the Federal Claims to Have Engaged in Any Act or Omission Resulting in Damage to the Plaintiff

Plaintiff Smith fails to specifically allege any act or omission on the part of Defendant Gainous which is actionable directly against him under Section 1983. In *Mo[n]ell v. Department of Social Services*, 426 U.S. 658 (1978), the U.S. Supreme Court found that the doctrine of *respondeat superior* cannot be applied to a supervisor or administrator so as to make such official liable under Section 1983 for the unconstitutional conduct of his subordinates. Therefore, the Court finds no valid Federal cause of action has been brought against Defendant Gainous.

J. Defendant Gainous is not Sufficiently Alleged, in any State Claim, to Have Engaged in Any Tortious Act or Omission

The Court finds that Plaintiff Smith has failed to state facts sufficient to demonstrate any claim of tortious or unlawful conduct on the part of Defendant Gainous. The Complaint, as amended, does not include any specific allegation of a tortious or unlawful act or omission on the part of Dr. Gainous. In particular, the Court finds an utter failure of the Plaintiff to meet the three requisites established in *American Road Service v. Inmon*, 394 So.2d 361, 365 (Ala. 1980), for the tort of outrage (stated by Plaintiff as "intentional infliction of emotional distress") to lie against Dr. Gainous.

K. The Claim of Retaliatory Discharge is not Recognized Under Alabama Law

The Court finds that the claim of "retaliatory discharge" stated in Count Four of the original Complaint is unallowable as not being recognized in Alabama Courts, particularly since said claim is brought against the "defendant/employer". The Court finds the "defendant employer" to be AATC, which the Court finds to be immune from prosecution of the State claims made by the Plaintiff.

## V. CONCLUSION

On the basis of the legal and factual findings stated hereinabove, the Court finds that the undisputed facts of the case, particularly as to the administrative hearing process by which Mr. Smith's termination was appealed, are such that a summary judgment motion may be properly considered by the Court. The Court further finds that the MOTIONS FOR SUMMARY JUDGMENT filed on behalf of all Defendants are due to be GRANTED. Therefore, the Court hereby DISMISSES all Counts in the Complaint, as originally filed and as amended, and DISMISSES WITH PREJUDICE Defendants Alabama Aviation and Technical College; Shirley Woodie, in her individual and official capacities; Fred Gainous, in his individual and official capacities; and John Fergus, in his individual and official capacities. COSTS are to be taxed against Plaintiff Alton Wayne Smith.

The Court acknowledges that Defendants have before the Court a pending motion for attorneys fees. The Court hereby reserves action on said motion and shall enter an

order on said motion at the proper time. The Court shall timely notify all attorneys of record if additional briefs or oral argument is deemed by the Court to be necessary and appropriate as to said motion for fees.

The Clerk is directed to forward a copy of the Order granting summary judgment, and the Memorandum Opinion stated hereinabove, to all attorneys of record in this action.

DONE and ORDERED on this 11 day of August, 1994.

/s/ P. Ben McLauchlin
P. Ben McLauchlin, Jr.
CIRCUIT JUDGE

## APPENDIX E

November 7, 1991

Mr. Alton Wayne Smith
304 Spruce Lane
Ozark, Alabama 36360

Dr. Shirley H. Woodie
Alabama Aviation and
Technical College
P.O. Box 1209
Ozark, Alabama 36361-1209

The Honorable
Nancy E. Perry
Alabama Educational
Association
P.O. Box 4177
Montgomery, Alabama
36103-4177

The Honorable
Jefferey A. Foshee
900 South Perry Street,
Suite B
Montgomery, Alabama
36104

The employee review panel has decided to uphold the termination of the employment of Mr. Alton Wayne Smith by the Alabama Aviation and Technical College in Ozark, Alabama.

The panel found sufficient testimony and evidence that there were reasons for this termination of employment on the grounds of "other good and just causes" and failure to perform duties in a satisfactory manner.

/s/ Billy D. Gaither
Dr. Billy D. Gaither
Panel member,
Chairperson

/s/ Bobby L. Holland
Mr. Bobby L. Holland
Panel Member

/s/ Glenn Howell
Mr. Glenn Howell
Panel Member

cc: Dr. Billy D. Gaither
Mr. Bobby L. Holland
Mr. Glenn Howell

## APPENDIX F

IN THE SUPREME COURT OF ALABAMA
October 25, 1996

1941820

Ex parte Alton Wayne Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Alton Wayne Smith v. Alabama Aviation and Technical College, et al.) (2940449) (Dale: CV-93-212)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

MADDOX, J. – Hooper, CJ., Shores, Houston, Kennedy and Cook, JJ., concur.

## APPENDIX G

Circuit Court No. CV 93-212 August 18, 1995

RE: 2940449

ALTON WAYNE SMITH vs. ALABAMA AVIATION & TECHNICAL COLLEGE, et als.,

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

___ Court Reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell ___ granted 7 additional days to file brief(s) to and including

___ Appellant(s) granted 7 additional days to file reply brief(s) to and including

___ Record on appeal filed on this date.

___ Submitted on Briefs

xxx Application for rehearing overruled, No opinion written on rehearing.

___ Permission to file amicus curiae briefs granted

___ Rules suspended

___ Transferred to the Supreme Court for lack of jurisdiction. A/N

___

MAILING ADDRESS:
300 Dexter Avenue
Montgomery, Alabama 36104-3741

/s/ John H. Wilkerson, Jr.
Clerk, Court of Civil
Appeals of Alabama

# APPENDIX H

## FEDERAL CONSTITUTIONAL AND STATUTORY AUTHORITY

### U.S. CONSTITUTION

### ARTICLE VI

(Supremacy Clause)

. . .

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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### AMENDMENT XIV [1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## STATUTES

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,[1] the court, in its discretion, may allow the

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[1] So in original.

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

# APPENDIX I

## STATE STATUTORY AUTHORITY

**§ 41-22-20 Judicial review of preliminary, procedural, etc., actions or rulings and final decisions in contested cases.**

(a) A person who has exhausted all administrative remedies available within the agency, other than rehearing, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) All proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review, unless waived by the agency or the court on a showing of substantial hardship. A petition shall be filed either in the circuit court of Montgomery county or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court of the county where a party other than an intervenor, resides or if a party, other than an intervenor, is a corporation, domestic or foreign, having a registered office or business office in this state, then in the county of the registered office or principal place of business within this state.

(c) The filing of the notice of appeal or the petition does not itself stay enforcement of the agency decision. If

the agency decision has the effect of suspending or revoking a license, a stay or supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the reviewing court, upon petition of the agency, determines that a stay or supersedeas would constitute a probable danger to the public health, safety, or welfare. In all other cases, the agency may grant, or the reviewing court may order, a stay upon appropriate terms, but, in any event, the order shall specify the conditions upon which the stay or supersedeas is granted; provided, however, if the appeal or proceedings for review to any reviewing court is from an order of the agency increasing or reducing or refusing to increase rates, fares, or charges, or any of them, or any schedule or parts of any schedule of rates, fares, or charges, the reviewing court shall not direct or order a supersedeas or stay of the action or order to be reviewed without requiring, as a condition precedent to the granting of such supersdeas, that the party applying for supersedeas or stay shall execute and file with the clerk of the court a bond as provided for and required by statute or law. If the circuit court shall fail or refuse to grant supersedeas or stay, the party seeking such relief may petition the appropriate court to which the appeal or review lies to order a supersedeas or stay of the action or order of the agency from which review is sought. After the required bond shall have been filed and approved by the clerk, such agency order shall be stayed and superseded, and it shall be lawful to charge the rates, fares, or charges which have been reduced, refused, or denied by the agency order, until the final disposition of the cause. The provisions of this subsection shall apply when applicable, anything in

Rule 60 of the Alabama Rules of Civil Procedure restricting the provisions of this subsection to the contrary notwithstanding.

(d) The notice of appeal or review shall be filed within 30 days after the receipt of the notice of or other service of the final decision of the agency upon the petitioner or, if a rehearing is requested under Section 41-22-17, within 30 days after the receipt of the notice of or other service of the decision of the agency thereon. The petition for judicial review in the circuit court shall be filed within 30 days after the filing of the notice of appeal or review. Copies of the petition shall be served upon the agency and all parties of record. Any person aggrieved who is not a party may petition to become a party by filing a motion to intervene as provided in Section 41-22-14. Failure to file such petition within the time stated shall operate as a waiver of the right of such person to review under this chapter, except that for good cause shown, the judge of the reviewing court may extend the time for filing, not to exceed an additional 30 days, or, within four months after the issuance of the agency order, issue an order permitting a review of the agency decision under this chapter notwithstanding such waiver. Any notice required herein which is mailed by the petitioner, certified mail return receipt requested, shall be deemed to have been filed as of the date it is postmarked. This section shall apply to judicial review from the final order or action of all agencies, and amends the judicial review statutes relating to all agencies to provide a period of 30 days within which to appeal or to institute judicial review.

(e) If there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt fact-finding proceeding under this chapter after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(f) Unreasonable delay on the part of an agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency.

(g) Within 30 days after receipt of the notice of appeal or within such additional time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record and transcript of the proceedings under review. With the permission of the court, the record of the proceedings under review may be shortened by stipulation of all parties to the review proceedings. Any party found by the reviewing court to have unreasonably refused to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(h) The petition for review shall name the agency as respondent and shall contain a concise statement of:

(1) The nature of the agency action which is the subject of the petition;

(2) The particular agency action appealed from;

(3) The facts and law on which jurisdiction and venue are based;

(4) The grounds on which relief is sought; and

(5) The relief sought.

(i) In proceedings for judicial review of agency action in a contested case, except where appeal or judicial review is by a trial de novo, a reviewing court shall not itself hear or accept any further evidence with respect to those issues of fact whose determination was entrusted by law to the agency in that contested case proceeding; provided, however, that evidence may be introduced in the reviewing court as to fraud or misconduct of some person engaged in the administration of the agency or procedural irregularities before the agency not shown in the record and the affecting order, ruling, or award from which review is sought, and proof thereon may be taken in the reviewing court. If, before the date set for hearing a petition for judicial review of agency action in a contested case, it is shown to the satisfaction of the court that additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may remand to the agency and order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modification, new findings, or decision with the reviewing court and mail copies of the new findings, or decision to all parties.

(j) The review shall be conducted by the court without a jury and, except as herein provided, shall in the review of contested cases be confined to the record and the additions thereto as may be made under subsection (i) of this section. Judicial review shall be by trial de novo in the circuit court where review is sought from tax assessments, tax determinations or tax redeterminations, rulings of the revenue department granting, denying, or revoking licenses, or rulings on petitions for tax refunds, or, unless a subsequent agency statute provides otherwise, where an agency statute existing on the effective date of Act No. 81-855, 1981 Acts of Alabama, or thereafter enacted provides for a trial de novo on appeal to or review by the courts; provided, however, in the review of tax assessments, tax determinations, or tax redeterminations, rulings of the revenue department granting, denying, or revoking licenses, or rulings on petitions for tax refunds, the administrative record and transcript shall be transmitted to the reviewing court as provided in subsection (g) of this section, and, on motion of either party, shall be admitted into evidence in the trial de novo, subject to the rights of either party to assign errors, objections, or motions to exclude calling attention to any testimony or evidence in the administrative record or transcript which is deemed objectionable or inadmissible. Provided further that, with the consent of all parties, judicial review may be on the administrative record and transcript. The court, upon request, shall hear oral argument and receive written briefs.

(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment

for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) In violation of any pertinent agency rule;

(4) Made upon unlawful procedure;

(5) Affected by other error of law;

(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

(l) Unless the court affirms the decision of the agency, the court shall set out in writing, which writing shall become a part of the record, the reasons for its

decision. (Acts 1981, No. 81-855, p. 1534, § 20; Acts 1986, No. 86-472, p. 880, § 1; Acts 1993, No. 93-627, p. 1051, § 1.)

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§ 41-22-21. Appeal of final judgment of circuit court under section 41-22-20.

An aggrieved party may obtain a review of any final judgment of the circuit court under section 41-22-20 by appeal to the appropriate court to which the appeal or review lies. The appeal shall be taken within 42 days of the date of the entry of the judgment or order appealed from as in other civil cases, although the appeal may be taken regardless of the amount involved. (Acts 1981, No. 81-855, p. 1534, § 21; Acts 1986, No. 86-472, p. 880, § 1.)

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**Alabama Fair Dismissal Act**

**§ 36-26-100. Definition of employees.**

The term "employees," as used in this article, is deemed to mean and include all persons employed by county and city boards of education, two-year educational institutions under the control and auspices of the state board of education, the Alabama Institute for Deaf and Blind not to include production workers at the Alabama Industries for the Blind, educational and correctional institutions under the control and auspices of the Alabama department of youth services, who are so

employed as bus drivers, lunchroom or cafeteria workers, maids and janitors, custodians, maintenance personnel, secretaries and clerical assistants supervisors and all other persons not otherwise certified by the state board of education. Only full-time employees who are not otherwise covered by the state merit system, the teacher tenure law, or other state statute at the time this article is adopted are intended to be covered by this article. Full-time employees include (a) adult bus drivers and (b) other employees whose duties require 20 or more hours in each normal working week of the school term, employing board holidays excepted. Substitute teachers and substitute employees are excluded from the article. (Acts 1983, No. 83-644, p. 1004, § 1.)

**§ 36-26-101. Probationary period; notice of termination.**

(a) All employees as defined in section 36-26-100 shall be deemed employed on a probationary status for a period not to exceed three years from the date of his or her initial employment, or a lesser period which may be fixed by the employing authority.

(b) During said probationary period, the employing authority shall cause the employee's performance to be evaluated.

(c) At any time during the employee's probationary period, the employing authority may remove an employee by furnishing said employee written notification at least 15 days prior to the effective day of termination. (Acts 1983, No. 83-644, p. 1004, § 2.)

**§ 36-26-102. Nonprobationary status; causes for termination.**

Upon the completing by the employee of said probationary period, said employee shall be deemed employed on a nonprobationary status and said employee's employment shall thereafter not be terminated except for failure to perform his or her duties in a satisfactory manner, incompetency, neglect of duty, insubordination, immorality, justifiable decrease in jobs in the system, or other good and just causes; provided, however, such termination of employment shall not be made for political or personal reasons on the part of any party recommending or voting to approve said termination. (Acts 1983, No. 83-644, p. 1004, § 3.)

* * *

**§ 36-26-103. Procedure for termination of employment.**

Employment of an employee on permanent status must be terminated only in the following manner:

> The employing board of education shall give notice in writing to the employee, stating in detail the reasons for the proposed termination, the facts upon which such reasons are based, and giving notice of the employee's rights to a hearing as set out herein. Said action of giving notice of termination shall be made only upon recommendation of the superintendent and upon approval of a majority of the members of the employing board which action shall be reflected in the board minutes. (Acts 1983, No. 83-644, p. 1004, § 4.)

**§ 36-26-104. Notice of termination; suspension with pay; notice of intention to contest.**

Notice to the employee shall be served either by personal service or by United States registered or certified mail with postage prepaid thereon, to said employee's last known address. The employing board may suspend said employee with pay until the charges are heard and determined. This section, however, does not mandate pay in cases involving moral turpitude. If such charges are found to be unfounded, pay would be reinstated. Such notice shall also inform the employee that in order to contest said termination, the employee must file with the employing board, within 15 days after receipt of such notice, notice of an intention to contest the termination of said contract. If the employee does not file an intention to contest with the employing board within 15 days after receipt of such notice of intention to terminate said contract, then the employing board may dismiss the employee by a majority vote and such dismissal shall be final. (Acts 1983, No. 83-644, p. 1004, § 5.)

**§ 36-26-105. Appellate process to contest termination; employee review panel.**

An appeal of the decision of the employing board may be filed by the employee within 15 days of receipt of the board's decision by mailing a notice to the superintendent of education and/or president of the junior/technical or community college or institution. Upon receipt of the request, the employing board and the employee may (1) mutually agree upon a person to hear

the employee's appeal or (2) select a panel of three persons, one selected by the employing board, and another selected by the employee and a third agreed upon by the two parties listed hereinabove which shall constitute an employee review panel to hear the employee's appeal. If there is no agreement on the selection of a third member within 10 days following the selection of the second member, the probate judge of the county in which the dispute originated shall submit the names of three individuals who are qualified electors of that same county who, in the probate judge's opinion, would be qualified through their experience and training to render a fair and impartial decision as the third member of the employee review panel and said persons selected for membership on the employee review panel shall not be currently employed in the field of education. From these three names, the employing board shall then strike the first name and the employee shall strike the second name with the person whose name remains becoming the third member of the employee review panel. (Acts 1983, No. 83-644, p. 1004, § 6.)

**§ 36-26-106. Hearing process.**

Upon the employee review panel's selection to hear a case, the panel shall within 10 days establish a date, place, and time for the hearing to be conducted. The date of such hearing shall in no case be later than 60 days following the decision of the employing board. Upon the completion of a de novo hearing, the panel's decision must be rendered within 45 days. The parties shall have the right of counsel or representation of their choosing. In making its decision, the panel shall consider whether the

action of the board or its administrative staff was arbitrary or unjust or for political or personal reasons on the part of any member of the board or its staff and whether the board's action was warranted based upon the facts of the case and the employment record of the employee. The decision of the panel shall be final and binding upon the parties. Expenses and fees of the employee review panel shall be shared equally by the board and employee. (Acts 1983, No. 83-644, p. 1004, § 7.)

**§ 36-26-107. Authority to transfer; appeal of decision.**

The employing board shall have authority to transfer employees, however, such transfer shall be based upon good and just cause needs of the school or institution and shall not be for political or personal reasons on the part of the recommending authority or any member of the employing board and shall be without loss of status for the employee. Appeals of a decision to transfer shall be handled in the same manner as for termination and the decision of the employee review panel shall be final and binding on the parties. (Acts 1983, No. 83-644, p. 1004, § 8.)

**§ 36-26-108. Authority to discipline; right to contest.**

The employing board of education shall have authority to reprimand, censure, or suspend with or without pay, an employee for just cause. Such action on the part of the employing board or its management shall not be for political or personal reasons on the part of the recommending authority or any member of the employing

board. The employee shall have the right to contest the board's action by appealing through the same manner as for termination and the decision of the employee review panel shall be final and binding on the parties. (Acts 1983, No. 83-644, p. 1004, § 9.)

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STATE TENURE COMMISSION ACT

**§ 16-24-30. Creation; composition; secretary; legal adviser.**

There is hereby created a State Tenure Commission to consist of seven members, who shall be selected as hereinafter provided. The executive secretary of the Alabama Education Association shall be ex officio secretary of the State Tenure Commission, and the Attorney General shall assign to the commission an assistant from his office who shall be the legal adviser to the commission. (Acts 1959, No. 643, p. 1557, § 1; Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-31. Appointment, terms and qualifications of members; vacancies; teacher's tenure not affected by membership.**

Within 30 days after November 19, 1959, the members of the State Tenure Commission shall be selected as follows: One member shall be appointed by the president of the Alabama Association of School Boards from among the members of the city and county boards of education for a term of seven years; one member shall be appointed

by the State Superintendent of Education from among the county and city superintendents of education for a term of six years; one member, who shall not be a member of the teaching profession shall be appointed by the president of the Alabama Congress of Parents and Teachers for a term of five years; two members, both of whom shall be currently employed as certified classroom teachers and both of whom shall have attained continuing service status under the teacher tenure law, shall be appointed by the Alabama Education Association for terms of four years and three years, respectively; one member, who shall not be a member of the teaching profession, shall be appointed by the Governor for a term of two years; and one member, who shall be currently employed as a certified principal or certified supervisor, shall be appointed by the State Superintendent of Education for a term of one year. During the 30 days immediately preceding the expiration of the respective terms of the members of the State Tenure Commission, each appointing authority designated herein shall appoint a successor member of the commission as provided herein for a term of seven years. Any provision to the contrary notwithstanding, however, each member of the commission shall serve until his successor is appointed. Any vacancy occurring on the commission shall be filled by appointment for the unexpired term in the same manner as the original appointment was made. Not more than one member of the tenure commission shall be appointed from any one congressional district. Membership on the commission shall not adversely affect the status of a teacher's tenure with the city or county board of education. (Acts 1959, No. 643, p.

1557, § 2; Acts 1973, No. 1079, p. 1835, § 1; Acts 1980, No. 80-271, p. 347.)

**§ 16-24-32. Meetings generally; quorum.**

The State Tenure Commission shall meet at such times and places as may be determined by the chairman of the commission, or of a majority of its members. Any five members of the commission shall constitute a quorum for the transaction of its business. The commission shall not meet on more than 30 days in any one year, nor shall any session of the commission continue for longer than five days. (Acts 1959, No. 643, p. 1557, § 3; Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-33. Organization meetings; chairman and vice-chairman.**

The State Tenure Commission shall hold a meeting in the City of Montgomery within 30 days after the members have been appointed as provided in this chapter for the purpose of organizing. The members shall elect a chairman and vice-chairman from among their own number, who shall serve as such for one year from the date of his election. (Acts 1959, No. 643, p. 1557, § 6; Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-34. Compensation and expenses of members; appropriations.**

The members of the State Tenure Commission shall be entitled to receive $15.00 a day for each day the commission is in session and shall be reimbursed for

necessary travel expenses incurred in going to and from meetings and in the performance of their duties at the same rates as provided for state employees. (Acts 1959, No. 643, p. 1557, § 4; Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-35. Rules, regulations and orders.**

The commission may adopt such rules, regulations and orders as may be reasonably necessary to carry out its functions. (Acts 1959, No. 643, p. 1557, § 7; Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-36. Appeals generally.**

It shall be the duty of the State Tenure Commission to hear and determine appeal cases as provided in Section 16-24-10, and the decisions of the State Tenure Commission shall be final to the extent provided by Section 16-24-38. (Acts 1959, No. 643, p. 1557, § 5; Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-37. Direct appeal by certain teachers denied hearing before local board of education.**

A teacher who has attained continuing service status and has been denied a hearing before the local board of education as required by Section 16-24-6 or 16-24-9 shall have the right to appeal directly to the State Tenure Commission for relief. The appeal shall state facts sufficient to allow the commission to determine tentatively whether or not the local board of education has complied with the provisions of Section 16-24-6 or 16-24-9. The local board may answer or deny in writing the facts set

out in the teacher appeal and, if it fails to so deny, the facts set out in the appeal must be taken as true. The commission shall review the teacher's request and the local board's answer or denial and shall determine, with or without hearing, whether or not the local board of education has complied with the provisions of Section 16-24-6 or 16-24-9, whichever is involved. Based upon its findings the State Tenure Commission shall:

(1) Order a hearing before the local board;

(2) Determine that the teacher has been transferred or dismissed in violation of the law and rescind the action taken by the local board; or

(3) Sustain the action taken by the local board.

Action taken by the State Tenure Commission under this section shall be final to the extent provided under this chapter for any other action of the commission. (Acts 1973, No. 1079, p. 1835, § 1.)

**§ 16-24-38. Finality of action of State Tenure Commission; review.**

The action of the State Tenure Commission in reviewing transfers of teachers or cancellation of teacher contracts, if made in compliance with the provisions of this chapter, and unless unjust, shall be final and conclusive. Whether such action complies with the provisions of this chapter and whether such action is unjust may be reviewed by petition for mandamus filed in the circuit

court of the county where said school system is located. (Acts 1973, No. 1079, p. 1835, § 1.)

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**§ 16-24-7. Transfer of teacher – Appeal.**

A teacher on continuing service status shall have the right to appeal within 15 days after the decision of the employing board to the State Tenure Commission, as hereinafter established, to obtain a decision by the commission as to whether such action was in compliance with this chapter and whether such action was taken for political or personal reasons and that such action was not arbitrarily unjust. If said appeal is not taken within 15 days after the decision of the board, the board's decision shall be final. Such appeal shall be taken by filing a notice of appeal with the commission and a copy with the employing board. Such appeal shall be heard not less than 30 days nor more than 60 days after such notice of appeal is filed with the commission, and the commission shall give such teacher not less than five days' notice of the time and place of such hearing. Such teacher shall have a right to appear with or without counsel and shall have a right to present argument to the commission based on the record of the proceedings before the employing board. No transfer shall be effected until the time for filing notice of appeal has expired and if notice of appeal is filed by said teacher not until after a hearing is held and the State Tenure Commission has evidenced its approval of the transfer of said teacher. The action of the State Tenure Commission shall be final and conclusive in

determining all questions relative to said transfer and shall be based on the record of the proceedings before the said board and the evidence as recorded at such hearing. (Acts 1953, No. 773, p. 1040; Acts 1981, No. 81-686, p. 1156, § 1.)

## APPENDIX J

IN THE SUPREME COURT OF ALABAMA
July 11, 1996

1941820

Ex parte Alton Wayne Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Alton Wayne Smith v. Alabama Aviation and Technical College, et al.) (2940449) (Dale: CV-93-212)

NOTICE

Petitioner granted to July 19, 1996 to file brief in support of rehearing.

**APPENDIX K**

EXCERPTS OF BRIEF
SUPPORTING REHEARING

IN THE SUPREME COURT OF ALABAMA

Case No. 1941820

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ALTON WAYNE SMITH,

Petitioner,

v.

ALABAMA AVIATION AND TECHNICAL COLLEGE, et al.,

Respondent.

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ON APPEAL FROM THE CIRCUIT COURT OF DALE COUNTY

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BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR REHEARING APPEAL NO. 294-0449

Mark Sabel
Sabel & Sabel, P.C.
2800 Zelda Road, Suite 100-5
Montgomery, AL 36106
(334) 271-2770

ORAL ARGUMENT IS REQUESTED

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Colorado Springs, CO 80903
(719) 475-1204

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EXCERPTS OF BRIEF
SUPPORTING REHEARING

IN THE SUPREME COURT OF ALABAMA

| | | |
|---|---|---|
| EX PARTE ALTON WAYNE SMITH, | § | SUPREME COURT CASE |
| | § | No. 1941820 |
| Petitioner, | § | |
| | § | |
| (IN RE: ALTON WAYNE SMITH, | § | |
| | § | COURT OF CIVIL |
| Plaintiff/Appellant, | § | APPEALS |
| | § | CASE NO. 2940449 |
| vs. | § | |
| | § | |
| ALABAMA AVIATION AND TECHNICAL COLLEGE, et al., | § | |
| | § | |
| | § | |
| Defendants/Appellees) | § | |

PETITIONER'S BRIEF IN SUPPORT
OF APPLICATION FOR REHEARING
STATEMENT REGARDING ORAL ARGUMENT

Petitioner Alton Wayne Smith respectfully asks this Court for oral argument in this matter. On June 28, 1996, this Court issued an opinion [hereinafter "Opinion" or "June Opinion"] based on reasoning that was neither briefed nor argued nor relied upon by any court below. The implications of this important ruling deserve development through briefing and oral argument.

## ARGUMENT

I. The Court's June Opinion Violates the Supremacy Clause.

A. The Newly Created Administrative Scheme Deprives Litigants of Remedies Guaranteed By State and Federal Law.

The June Opinion requires discharged state employees who. . . .

* * *

II. THE JUNE OPINION'S NEWLY ARTICULATED EXHAUSTION REQUIREMENT OVERRULES THIS COURT'S PRIOR HOLDING IN EX PARTE AVERYT.

A. Ex Parte Averyt Should Not Be Overruled.

Until the June 28 Opinion, the law of this Court for over a decade was that a circuit court, when acting as a reviewing court on appeal from an administrative decision, lacked the minimal power to even evaluate constitutional claims. *Ex Parte Averyt,* 487 So.2d 912 (Ala. 1986). *See Joyner v. City of Bayou La Batre and Personnel Bd. for Mobile County,* 572 So.2d 492, 493 (Ala. Civ. App. 1990) (In a case where employee appealed to the circuit court, the court stated, "Only by invoking the general jurisdiction of the circuit court, by way of a collateral suit, could Joyner have had his constitutional questions address.").

Furthermore, an Alabama Circuit Court cannot review the constitutionality of an employee's discharge on appeal from a non-lawyer's administrative determination of its constitutionality. *Carlisle v. Phenix Bd. of Educ.,*

849 F.2d 1376, 1381-82 (11th Cir. 1988), *op. adopted by the Ala. Sup. Ct. on certification from the M.D. Ala.*, 543 So.2d 194, 195 (Ala. 1989). *Id.* If an administrative panel is without authority to review a constitutional issue, then the circuit court to which an appeal lies is similarly without such authority. *City of Homewood v. Caffee*, 400 So.2d 375 (Ala. 1981) ("Thus, if [petitioner] has valid claims not cognizable before the [administrative board], he will likewise be precluded from litigating those claims to the circuit court on appeal pursuant to [authorizing statute].")

In *Averyt*, while ruling that the circuit court did not have authority to decide the constitutional issues implicated, this Court stated, "*[O]nly* by invoking the general jurisdiction of the Circuit Court, by way of a collateral suit, could Averyt's constitutional challenges be raised and presented for determination." *Id.* at 914 (emphasis added). Thus, although the June Opinion of this court rests solely on the purported failure of Smith to file an appeal to the Circuit Court for its review, the Circuit Court was without authority to rule on the constitutional issues. The Court's suggested remedy did not in fact exist.

The June Opinion is in direct conflict with *Averyt*. In that case, the Court ruled that the failure to raise constitutional issues before an administrative panel and the subsequent failure to appeal those issues to the circuit court was no bar to a collateral action. Indeed, the Court in *Averyt* characterized the same procedural construct that was created by the June Opinion as an impermissible "Catch-22" that would result in a "miscarriage of justice." *Id.*

At the time that Smith filed his collateral suit in federal court, he did not have a right to appeal constitutional issues to the circuit court, as the Court in the instant case suggests is the proper remedy. In *Averyt*, the CCA held that a plaintiff's failure to raise constitutional claims before an administrative panel barred review of those issues before the circuit court. *Averyt*, 487 So.2d at 913. This Court stated that the claims were barred, but made clear that this had nothing to do with the plaintiff's failure to raise them before the administrative panel. The *only* reason that the constitutional claims were barred was for the "fundamental reason that [the circuit court's] jurisdiction is limited to a consideration of issues properly raised and made of record before the Board, *and those do not include constitutional issues.* In other words, only by invoking the general jurisdiction of the circuit court, by way of a collateral suit, could Averyt's constitutional challenges be raised and presented for determination." *Id.* at 914 (emphasis added). In *Averyt*, the Court not only held that a circuit court lacked power to determine constitutional issues on appeal from administrative panels, but it held that the *only* mechanism by which plaintiff's constitutional claims could be litigated was by way of a collateral suit in circuit court.

B. Retroactively Applying the June Opinion Violates Smith's Due Process and Equal Protection Guarantees

The retroactive application of this Court's newly invented rule, when used to bar Smith's claim, violates both state and federal due process and equal protection guarantees. In *Logan v. Zimmerman Brush Co.*, 102 S. Ct.

1148 (1982), the Court held that "a cause of action is a species of property" that may not be taken away without due process of law. *Id.* at 1154. Thus, due process protections forbid this Court from denying a potential litigant such as Mr. Smith his use of established adjudicatory procedures. *Id.* Preclusion of Smith's claims would also violate the Equal Protection Clause. *Logan*, 102 S. Ct. at 1160-61. Likewise, the analogous provisions of the Alabama Constitution are also violated by this result. *See* Ala. Const. Art. I §§ 10, 11, and 12; §§ 1, 6, and 22 (equal protection); §§ 6 and 13 (due process).

To the extent that the Court creates a new rule in this case, the Court should not apply this newly invented rule to bar Petitioner's claim. After all, at the time that Petitioner could appeal, the law was clear that the circuit court would not have power to hear his claim. It would be manifestly unjust to bar his claim based on such an unpredictable development.

Smith followed the instructions of *Averyt* to the letter. Moreover, *Averyt* forbade Smith from appealing the decision of the administrative panel, a gesture that this Court now says is a mandatory prerequisite to litigating constitutional claims in state court. If this Court has changed the rules, the rules should not apply to bar Smith's claims, because at the time he instituted this action, he had *no additional administrative recourse.* At that time, an appeal to the circuit court for resolution of constitutional claims was unavailable. Thus, the June Opinion fatally faults Smith for not pursuing to exhaustion an administrat[ive] claim that this court had repeatedly held did not exist.

## III. THE JUNE OPINION VIOLATES SETTLED SUPREME COURT PRECEDENT BY IMPOSING AN EXHAUSTION REQUIREMENT ON SECTION 1983 LITIGANTS.

Although the June Opinion holds that Smith's claims are barred because Smith declined to appeal the administrative ruling to a circuit judge, a section 1983 claim cannot be barred by a plaintiff's failure to exhaust state remedies with respect to an unreviewed administrative action. *Patsy v. Board of Regents*, 457 U.S. 496, 516, 102 S.Ct. 2557, 2568 (1982); *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1070 (11th Cir. 1987).

In *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496 (1982), the U.S. Supreme Court definitively ruled that § 1983 plaintiffs are guaranteed immediate access to judicial forums without having to exhaust state administrative remedies. Any doubt regarding whether the *Patsy* no exhaustion rule applied to state court litigation was ended in *Felder v. Casey*, 108 S. Ct. 2302 (1988). The *Felder* court rejected the use of notice of claim requirements in state court § 1983 litigation by characterizing the state policy as "an [impermissible] exhaustion requirement on persons who choose to assert their federal right in state courts." *Id.* at 2311.

Post-*Felder* decisions rejecting exhaustion of administrative remedies requirements in state court § 1983 actions include: *Hall v. City of Dothan*, 539 So.2d 286, 290 (Ala. Civ. App. 1988); *Zeigler v. Kirschner*, 162 Ariz. 77, 781 P.2d 54 (Ct. App. 1989); *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (Tax Ct. 1990); *Arkansas State Medical Bd. v. Leipzig*, 299 Ark. 71, 770 S.W.2d 661 (1989); *Patel v.*

*Thomas*, 793 P.2d 632 (Colo. Ct. App. 1990); *Montoya v. City of Colorado Springs*, 770 P.2d 1358 (Colo. Ct. App.), *cert denied*, 783 P.2d 838 (Colo. 1989); *Howlett v. Rose*, 571 So.2d 29 (Fla. Dist. Ct. App. 1990) (on remand) (relying on *Patsy* and noting that "[e]xhaustion of state administrative remedies is not a prerequisite to an action under section 1983"); *Brumage v. Woodsmall*, 444 N.W.2d 68 (Iowa 1989); *Earle v. Gunnell*, 78 Md. App. 648, 554 A.2d 1256 (1989); *Blackwell v. City of St. Louis*, 778 S.W.2d 711 (Mo. Ct. App. 1989) (rejecting application of exhaustion of administrative remedy requirement to § 1983 cases), *cert. denied*, 110 S. Ct. 1784 (1990); *Givbney v. Toledo Bd. of Educ.*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988); *Green v. Cole*, 1989 WL 3120 (Tenn. Ct. App. Jan. 20, 1989); *Cf. Conley v. Massachusetts Bay Transp. Auth.*, 405 Mass. 168, 539 N.E.2d 1024 (1989) (noting that the trial court had not required exhaustion of a union grievance procedure as a prerequisite to filing a § 1983 action); *Binkley v. City of Tacoma*, 114 Wash. 3d 373, 787 P.2d 1366 (1990) (acknowledging that exhaustion of administrative remedies is not a prerequisite to bringing a § 1983 action).[8]

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[8] Prior to *Felder*, several state courts had predicted *Felder's* outcome and applied the non-exhaustion rule to their courts. *See, e.g., Fetterman v. University of Conn.*, 192 Conn. 539, 473 A.2d 1176 (1984); *Marker v. Talley*, 502 A.2d 972 (De. Super. Ct. 1985); *Maryland Nat'l Capitol Park & Planning Comm'n v. Crawford*, 59 Md. App. 276, 475 A.2d 494, 501 (1984), *aff'd on other grounds*, 307 Md. 1, 511 A.2d 1079 (1986); *O'Connors v. Helfgott*, 481 A.2d 388 (R.I. 1984); *Logan v. Southern Cal. Rapid Transit Dist.*, 136 Cal. App. 3d 116, 124, 185 Cal. Rptr. 878, 833 (1983) (following *Patsy* no-exhaustion rule and holding that states may not impair federally created rights or impose conditions on them); *Best v. California Apprenticeship Council*, 193 Cal. App. 3d 1448, 240 Cal.

Moreover, exhaustion policies cause many plaintiffs to avoid state courts because of the risk that they would be required to exhaust administrative remedies or pay the price for failing to do so. The U.S. Supreme Court, however, has construed § 1983 uniformly so plaintiffs would not have an incentive to avoid state courts and there is a similar federalism interest in assuring that the § 1983 no-exhaustion policy is applied in both state and federal courts. *Cf. Maine v. Thiboutot,* 448 U.S. 1, 11 n.12 (1980) (considerations of federalism support the availability of attorney fees in § 1983 actions in both state and federal courts).

Any requirement that "produce[s] different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court" is impermissible. *Felder,* 108 S. Ct. at 2308. Applying a "converse-Erie" approach in which it stressed the interest in "intra-state uniformity," *Felder* held that "states may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Id.*

The ability of states to create exclusive state remedies and thereby preclude the availability of § 1983 actions is inconsistent with the basic nature of § 1983 as a supplemental remedy. The Supreme Court addressed this issue in *Wilder v. Virginia Hospital Association,* 110 S. Ct. 2510 (1990), where the Court made clear that § 1983 is available to enforce the provisions of the federal Medicaid Act dealing with rates of reimbursement for medical providers. In the course of discussing whether federal law

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Rptr. 1 (1987) (same); *White v. State of California,* 195 Cal. App. 3d 452, 240 Cal. Rptr. 732 (1987) (same).

contained a system of remedies sufficiently comprehensive to support the conclusion that Congress intended to preclude enforcement under § 1983, the Court also looked to the availability of judicial review under state law. The state had argued that the availability of judicial review under the State Administrative Procedure Act was relevant to whether relief was available under § 1983, but the Court rejected this argument, relying on its decision in *Monroe v. Pape*, 365 U.S. 167 (1961), establishing the independent availability of § 1983 as a supplemental remedy. *Wilder*, 110 S. Ct. at 2524 n.20.

## CONCLUSION

Petitioner respectfully requests, for the foregoing reasons and for all of the reasons previously raised, that the June Opinion be vacated and that the opinion of the CCA be reversed. Respectfully submitted this the 19 day of July 1996.

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Supreme Court, U.S.
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No. 96-1171

In The

# Supreme Court of the United States

October Term, 1996

ALTON WAYNE SMITH,

*Petitioner,*

vs.

SHIRLEY WOODIE, individually and in her official capacity as President of Alabama Aviation and Technical College, FRED GAINOUS, in his official capacity as Chancellor, and JOHN FERGUS, individually and in his official capacity as Dean of Instruction of Alabama Aviation and Technical College,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Alabama Supreme Court**

## BRIEF IN OPPOSITION

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10 pp

## QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to consider Petitioner's argument, since the issues presented to this Court were neither decided nor timely presented to Alabama's courts?

2. Does this Court lack jurisdiction to consider Petitioner's argument, since the state court decision rests upon adequate and independent state grounds, in that:

a. The Supreme Court of Alabama decision was expressly based upon a nonfederal ground?

b. The Supreme Court of Alabama is presumed to have based its denial of rehearing on a state ground?

c. The trial court's decision was also based upon the limitations period lapsing?

d. The trial court's decision was also justified by Petitioner's failure to timely oppose Respondents' motions for summary judgment?

3. Was Alabama's application of its rules of practice and issue preclusion to Petitioner's 42 U.S.C. § 1983 claim a valid exercise of State authority?

4. Are the issues presented by Petitioner to this Court such that they do not warrant this Court's attention, since they relate only to the Petitioner and whatever few other litigants whose counsel might choose to ignore Alabama's rules of practice for seeking judicial review of agency decisions?

## LIST OF INTERESTED PERSONS

The Petitioner is correctly identified, in the caption to the Petition for Writ of Certiorari, as Alton Wayne Smith.

The Respondents are not correctly identified in the caption to the Petition. Dr. Shirley Woodie, both in her individual capacity and in her official capacity as President of Alabama Aviation and Technical College, is correctly identified as a Respondent. Mr. John Fergus, both in his individual capacity and in his official capacity as Dean of Instruction at Alabama Aviation and Technical College, is also correctly identified as a Respondent. However, Alabama Aviation and Technical College is not a Respondent to the Petition. Although Alabama Aviation and Technical College was named as a defendant to Petitioner Smith's amended complaint, Petitioner did not appeal the trial court's entry of summary judgment in favor of said college. *See* Petition, at p. B-7. Furthermore, with respect to Dr. Fred Gainous, he was named as a defendant, to the amended complaint, both individually and in his official capacity as Chancellor. However, on appeal the Petitioner specifically stated that he was not challenging the trial court's grant of summary judgment to Dr. Gainous individually. *Brief of Appellant Alton Wayne Smith* [to the Alabama Court of Civil Appeals], at p. 18. Consequently, Dr. Fred Gainous is a Respondent, to the instant Petition, only in his official capacity as Chancellor.

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the instant petition for writ of certiorari (hereinafter referred to as the "Petition") seeking review of an opinion of the Supreme Court of Alabama. The Supreme Court of Alabama opinion is reported as *Ex parte Alton Wayne Smith*, 638 So. 2d 431, 1996 LEXIS 173 (Ala. 1996), *petition for writ of cert. filed*, 65 U.S. 3531 (January 23, 1997) (No. 96-117).

## STATEMENT OF JURISDICTION

Because the questions presented for review in the petition were not timely presented to the Supreme Court of Alabama, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). *See* pp. 9-13 below. Nor does this Court possess jurisdiction over this case since the Supreme Court of Alabama decision and trial court judgment were based upon adequate and independent state grounds. *See* pp. 13-22 below.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved in this case include the First and Fourteenth Amendments to the United States Constitution. The federal statutes involved are 28 U.S.C. § 1257(a), 42 U.S.C. § 1983, and 42 U.S.C. § 1988. Pertinent state authority includes *Ala. Code* § 6-2-38 (1975); Rules 1(c), 9(h), 15(c), and 56, Ala. R. Civ. P.; Rule 28(a)(5), A.R.A.P.; the *Revised Hearing Procedure* of the Alabama State Board of Education; and, according to the Supreme Court of Alabama, also *Ala. Code* §§ 36-26-100-108 and § 41-22-20(k)(1) (1975). Although the Petitioner asserts that *Ala. Code* § 16-24-30-38 (1975) is among the pertinent state statutory authority (*see Petition*, at pp. 2, I-14-20), said section (relating exclusively to Alabama public elementary and secondary teachers, and having no relationship to Petitioner and other Alabama two-year college teachers) has no relevance whatsoever

to this case. Insofar as the Petitioner states that the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution is involved, said Clause is not pertinent to this appeal since, although Petitioner's amended complaint included an allegation that his right to equal protection of the laws had been abridged, on appeal through Alabama's appellate courts, Petitioner abandoned such allegation.

## STATEMENT OF THE CASE

### A. Statement Of Facts

Petitioner Alton Wayne Smith was employed, as a tenured ("nonprobationary") instructor of avionics, at Alabama Aviation And Technical College (hereinafter referred to as the "College"), a trade school located in Ozark, Alabama. Petitioner Smith's employment was terminated for "good and just causes," set forth in an August 28, 1991 written notice of termination from Dr. Shirley Woodie, President of the College. C-184-192; C-153-192.[1] Petitioner was fired for those reasons alone, and not for arbitrary, political, or personal reasons, such as Petitioner's having exercised his First Amendment free speech rights through allegedly making remarks critical of former or then current college officials or education policies. C-153-192.

The College presented to an administrative hearing panel (the "employee review panel"), which heard Petitioner's appeal of his firing, and to the trial court, overwhelming proof that President Woodie had much more

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[1] The "record on appeal" to the Alabama Court of Civil Appeals and Supreme Court of Alabama, recording the proceedings before the Circuit Court of Dale County, Alabama (the "trial court") and the court reporter's transcription of a hearing before the administrative body known as the "employee review panel," is contained in ten volumes, which are consecutively page-numbered and which will be referenced herein as "C Page."

than ample reasons to fire Petitioner. C-115-152. The evidence as to why Petitioner's employment was terminated (C-115-900), demonstrated the extremely improper, and indeed bizarre, behavior in which the Petitioner engaged. For example, for three consecutive days, Petitioner distracted another instructor, and that instructor's class, by appearing on the other side of a glass wall (at the rear of the classroom), making the obscene gesture known as "flipping the bird," and mouthing other obscenities such as "you M . . . F . . . " C-146. On two other days, Petitioner blocked a college hallway and made physically threatening motions toward another teacher (C-146). On various other occasions, Petitioner made comments which led other instructors to believe that he may have poisoned their coffee with battery acid. C-151; C-158.

Petitioner also deliberately committed numerous violations of the College's written sick leave policy (*see* Petition, at pp. B-2-3; C-117-34; C-156-57), including one occasion when Petitioner stated that he had to be on sick leave for an entire week due to supposed *emergency* surgery, in Jacksonville, Florida, on his wife. However, as the records from Mayo Clinic – Jacksonville and St. Luke's Hospital made quite evident, Petitioner's wife did *not* have emergency surgery but instead had elective cosmetic breast reduction surgery, which her physician had indicated months before could be scheduled at her convenience. During the following week, Petitioner asserted to College officials that it was necessary for him to miss all his classes for that entire week to take care of his wife, when, in fact, he did not need to attend to his wife. C-117-34.

Petitioner's misconduct also included other serious aspects. Petitioner often, without advance warning or explanation, would exit his classroom, leaving his students without supervision. *Petition*, at p. B-3. When he remained in class, further problems developed, because Petitioner failed to follow the syllabus for the course he was teaching, tested students on material which had not

been covered in class or otherwise assigned, and inappropriately discouraged student questions. *Petition*, at p. B-3; C-158; C-141-42. Indeed, student dissatisfaction with Petitioner became so great that a relatively large group of students "en masse" refused to register for the Fall 1990 quarter unless they were assured that Petitioner would not be their instructor. *Petition*, at p. B-3. Furthermore, on July 19, 1991 all 14 of the students in one of Petitioner's classes signed and delivered to Respondent Fergus a *unanimous* petition of protest, listing their specific complaints about Petitioner. *Petition*, at p. B-3; C-137; C-139-40.

### B. Course of Proceedings And Disposition Of The Case Below

The administrative proceedings regarding the appeal of Petitioner's termination were conducted pursuant to the "Revised Hearing Procedure" of the State Board of Education. *Petition*, at p. B-2. The Revised Hearing Procedure provides for the same administrative appeal process as does the "Fair Dismissal Act," codified at Ala. Code §§ 36-26-100-108 (1975).

Pursuant to the process set forth in the Procedure, on August 28, 1991, President Woodie delivered a written "notice of termination" of employment. C-153-154; 183-207. The notice stated the reasons for the termination, informed Petitioner of his right to administratively contest and appeal the President's decision, advised Petitioner as to which persons may be called to testify on behalf of the College in the event of an appellate hearing, and described the witnesses' potential testimony. Under the Procedure, if Petitioner desired to appeal his firing, then he had fifteen days in which to file a written notice of appeal and request a hearing before a three-person hearing panel (called an "employee review panel"). Petitioner timely appealed.

The Procedure further provides that the members of the hearing panel are then to be selected, with the first of

three panel members being selected by the employing college. The second panel member is selected by the employee. The third panel member is chosen by a process of elimination. Specifically, one or both parties request that the local probate judge provide to the parties a list of three persons whom the judge believes are able to render an impartial decision. Upon receipt of such a list, the employing college strikes one name from the list, and the employee then strikes another name. The person remaining on the list becomes the third panel member. This selection process was followed in Petitioner's appeal of his termination from employment. Although Petitioner attempts, in his Petition, to complain that the employee review panel members were not attorneys, (and Petitioner Smith claims that such worked to violate his federal rights – *see Petition*, at p. 13), Petitioner himself voluntarily selected, as the second panel member, an individual who was not an attorney.

During the employee review panel hearing (which took place on October, 26, 1991, October 28, 1991, and November 3, 1991), the College presented overwhelming evidence that Petitioner had engaged in the inappropriate behavior described hereinabove (and summarized in the Court of Civil Appeals Opinion). Petitioner's attorney cross-examined the College's witnesses, and presented witnesses on behalf of Petitioner. During the hearing, Petitioner challenged the accuracy of the charges made against him, contended that his conduct was not inappropriate, argued that he was fired due to his filing a State Board of Adjustment claim, *and* argued that he was being fired for exercising his First Amendment right of free speech in criticizing various people, policies, or events. C-528-33; C-1498-1501; C-154; C-515.

After concluding the hearing, the panel issued its *unanimous*, November 7, 1991, decision upholding the termination of Petitioner's employment as being for good and just causes, not for personal or political reasons, and as not being arbitrary or capricious.

On August 25, 1993, Petitioner filed, in Dale County, Alabama Circuit Court, a complaint against the College, Dr. Shirley Woodie (in her individual capacity only), and various fictitious defendants. The complaint consisted of four counts: (1) "Breach of Contract"; (2) "Breach of Implied Covenant of Good Faith and Fair Dealing"; (3) "Intentional Infliction of Emotional Distress"; and (4) "Retaliatory Discharge". C-5-7.

On November 8, 1993, *after* the applicable two-year statute of limitations period had already run, Petitioner filed an amended complaint, which attempted to add as defendants Dr. Fred Gainous, individually and in his official capacity as Chancellor, John Fergus, individually and in his official capacity as Dean of Instruction of the College, and Dr. Shirley Woodie in her official capacity as President of the College. C-34-35. The pleading then proceeded to state a number of erroneous "factual" allegations. (C-35-37) that Petitioner had made various (presumably oral) comments, and had written various letters, critical of his employer and/or its former officials.

Petitioner also asserted that on or about August 28, 1991, he was notified that his employment was being terminated, that thereafter a hearing was conducted on the matter of the appeal of his termination, and that the various allegations of misconduct presented to the administrative hearing panel were not the true reasons for his termination from employment, but that the true reason he was fired was "to cause the Plaintiff to quit exercising his First Amendment privileges and vocally criticizing wasteful or dishonest practices of the Defendants." C-37. Petitioner neglected to explain why he contended, in the amended complaint, that he was fired due to his "free speech", when he had asserted unequivocally in his original Complaint that the "*sole reason*" he was fired was because he filed a claim with the State Board of Adjustment. C-6-7. The amended complaint presented four additional counts. The count pertinent to this appeal stated, in its entirety, that:

> "The Plaintiff alleges that the Defendants are liable to him under 42 U.S.C. § 1983 because they violated his First Amendment right of free speech." C-38.

All of the Respondents filed joint motions to dismiss, or in the alternative, motions for summary judgment (C-111-112; C-1779), accompanied by voluminous supporting affidavits, medical records, college records, and other evidence. C-113-900; C-1722-1725. Pursuant to Rule 56 Ala. R. Civ. P. (*see* Appendix B), a narrative summary of undisputed material facts was also filed. C-115-149; C-1726-1761. In addition, in order to substantiate the Respondents' collateral estoppel/issue preclusion defense, a copy of the administrative hearing record was filed. C-901-1721.

Thereafter, over a period of seven months, Petitioner twice changed attorneys and was twice granted continuances of the hearing on Respondents' motions for summary judgment. *See Petition*, at Appendix B.

Eventually, the summary judgment hearing was reset for July 25, 1994, but neither Petitioner nor his attorney appeared at the summary judgment hearing. The trial court entered a summary judgment for the Respondents on August 12, 1994, holding that: all state claims against the College and Respondents Woodie, Fergus, and Gainous in their official capacities were due to be dismissed because of state immunity; that all federal claims against the College were due to be dismissed because the College was not a suable "person" under 42 U.S.C. § 1983; that all claims were barred (that is collaterally estopped) by the employee review panel decision; that the § 1983 claims were barred by the statute of limitations; and that Petitioner had failed to state a valid claim for relief under § 1983. C-1809-10; C-1790-1808.

On September 12, 1994, Petitioner filed a motion to vacate or set aside the judgment, or in the alternative for a new trial. C-1811-75. As grounds for this motion, Petitioner alleged that he did not receive notice of the summary judgment hearing conducted by the trial court on July 25, 1994 (even though Court records showed that

notice was sent to Petitioner's third attorney on June 21, 1994); that his complaint set forth a claim for relief under § 1983; and that the facts before the trial court created a genuine issue of material fact. After conducting a hearing on Petitioner's motion, on October 25, 1994, the trial court denied Petitioner's motion, finding that it had not erred in granting the Respondents' motions for summary judgment. C-1917-18.

Petitioner appealed the summary judgment, seeking reversal and remand only as to the claim(s) purportedly alleged, in his amended complaint, pursuant to 42 U.S.C. § 1983, as to Respondents Woodie, Fergus, and Gainous. On June 16, 1995, the Alabama Court of Civil Appeals affirmed, opining that issue preclusion was dispositive of Petitioner's Section 1983 claim(s). *See* Appendix B to *Petition*. On July 25, 1995, Mr. Smith filed an application for rehearing, which was overruled on August 18, 1995.

Through his sixth and seventh attorneys, on September 1, 1995, Petitioner filed with the Supreme Court of Alabama a petition for writ of certiorari. Thereafter, the petition was granted. On June 28, 1996, the Supreme Court affirmed the Alabama Court of Civil Appeals, and, on October 25, 1996, overruled Petitioner's application for rehearing. *See* Appendices A and F to *Petition*. The instant petition to this Court followed.

### C. Correction Of Misstatements In The Petition

Although understandably not something which the Petitioner desires to mention, the facts of the case were accurately set forth in the Alabama Court of Civil Appeals decision, attached to the Petition as Appendix B thereto. As noted in the *Constitutional Provisions, Statutes, And Rules Involved* section hereinabove, Petitioner is mistaken about the applicability of certain constitutional provisions and statutes to this case. Petitioner is also mistaken, in several respects, with regard to what the Supreme Court of Alabama held, what was and was not procedurally required of Petitioner, and the consistency

of the decisions below with other pertinent precedent. For convenience and clarity, the relevant misstatements are addressed in the Argument below.

## REASONS FOR DENYING THE WRIT

### I. THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S ARGUMENT, SINCE THE ISSUES PRESENTED WERE NEITHER DECIDED NOR TIMELY PRESENTED TO ALABAMA'S COURTS

This Court lacks jurisdiction to consider the questions presented in the Petition because such questions were neither decided by, nor timely presented to, Alabama's courts. 42 U.S.C. § 1257 requires, of course, (a) that there be a final judgment or decree rendered by "the highest court of a State in which a decision could be had," and (b) that the final judgment must reflect a substantial federal question that has been *properly raised* and *necessarily decided* in the state court proceedings." R. Stern et al., *Supreme Court Practice*, sec. 3.1, at p. 90 (7th ed. 1993). The proper method of raising the federal question is determined by state law. *Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, dissenting) ("It is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues").

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). In accord: R. Stern et al., *Supreme Court Practice*, sec. 3.17, at p. 122 (7th ed. 1993) ("The party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised"), and cases cited therein. "If the petitioner or appellant adequately discharges this burden,

and if the federal question was necessary to a determination of the case and no adequate state ground of decision is apparent, then and then only can the Supreme Court take jurisdiction over the case." *Id.*, at p. 123.

Furthermore, if the state procedural requirements are not complied with, the Supreme Court will decline to exercise jurisdiction, regardless of whether or not the highest state court expressly refused to decide the federal question because of the procedural failure, or was completely silent on the federal question (the Court assumes that the silence is due to the procedural deficiency). *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). Thus, an application for rehearing, submitted to the highest state court, which raises the federal question for the first time, is generally insufficient to establish jurisdiction in this Court, unless the state court expressly considered and decided the question presented on rehearing. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Prudential Federal Savings and Loan Association v. Flanigan*, 478 U.S. 1311, 107 S.Ct. 38, 92 L.Ed.2d 761 (1986); *Webb v. Webb*, 451 U.S. 493 (1981); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443, 55 S.Ct. 794, 795 (1935).

The Respondents realize, of course, that there are extremely limited situations in which raising a federal question for the first time in a petition for rehearing may be considered timely. But such situations occur only where the federal question arises from an *unexpected* decision of the highest state court, which gave the petitioner no prior opportunity to assert the particular federal question, but instead, was a surprise and could not have been reasonably anticipated. *Herndon v. Georgia, supra; Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930); R. Stern et al., *Supreme Court Practice*, sec. 3.1, at p. 129 (7th ed. 1993).

Petitioner has neither asserted that the instant case fits within the *Herndon* exception, nor articulated just how he may have failed to anticipate the Alabama

Supreme Court's decision. Petitioner merely states that "the sole basis for [the Supreme Court of Alabama's] ruling against Smith . . . was that Smith failed to exhaust his administrative remedies," and such a "question of administrative exhaustion had not been briefed or argued in any lower tribunal." *Petition* at p. 4. Petitioner goes on to state that he therefore "filed for rehearing" and therein "asserted that the court's newly articulated rule violated the Supremacy Clause . . . and the Fourteenth Amendment," but that his application was denied without opinion. *Petition for Writ of Certiorari,* at p. 4.

Even if Petitioner had argued to this Court that he was justifiably surprised by the Alabama Supreme Court's decision, insofar as it applied issue preclusion based upon the ruling of the employee review panel, as to which ruling the Petitioner did not seek judicial review by petitioning for writ of certiorari, such argument would have been erroneous. Indeed, Petitioner would have needed to convincingly persuade this Court that, prior to the Supreme Court of Alabama decision in this case, he had no reason to anticipate that, in order to not be bound to an employee review panel ruling, he needed to seek judicial review of such a ruling by filing, in an Alabama trial (circuit) court, a petition for writ of certiorari to the panel, and prevail in such trial court proceeding. However, even a cursory review of Alabama cases concerning employee review panel decisions would have easily disclosed to Petitioner's former attorneys that, in order to successfully present his claims in Alabama's courts, Petitioner must, consistent with Alabama's rules of practice, seek relief from the employee review panel decision by petition for writ of certiorari.

For example, in *Hughes v. Britnell,* 554 So. 2d 1041, 1042-43 (Ala. Civ. App. 1989), *cert. denied,* 596 So. 2d 56 (1989), some *four years before* Petitioner's suit, the Alabama Court of Civil Appeals reviewed a circuit court's grant of summary judgment to a State two-year college president, in two college employees' lawsuits subsequent to employee review panel decisions with which the

employees were dissatisfied. Noting that the employees had improperly sought relief through a petition for mandamus, rather than filing a petition for writ of certiorari, the Court cautioned future litigants as follows:

> "This case is before us as an appeal from the summary dismissal of a writ of mandamus. We wish to emphasize that . . . the proper vehicle for review to the circuit court is by a writ of certiorari. Fields v. State ex rel. Jones, 534 So. 2d 615 (Ala.Civ.Appl. 1987); Ex parte Smith, 394 So. 2d 45 (Ala.Civ.App. 1981). From a decision by the circuit court on the writ of certiorari, review to this court would be on an appeal. Fields, 534 So. 2d 615.
>
> For a complete review of the proper procedure to be followed in these cases, see Fields, 534 So. 2d 615."

Similarly, in *Hardy v. Birmingham Board of Education*, 634 So. 2d 574, 576 (Ala.Civ.App. 1994) the Alabama Court of Civil Appeals reiterated that "the proper vehicle for review [in] the circuit court [of an employee review panel decision] is . . . [a] writ of certiorari . . . In cases such as this, the only available means of review is the common law writ of certiorari." Since the employer had not sought such a remedy, it was, the Court ruled, bound to the panel decision, and could not just choose to simply ignore the panel decision in subsequent litigation. *Id.*, at p. 576. The Court commented that the parties to panel hearings must *follow the rulings* of the panel (even though they believe a panel exceeded its authority) or successfully *seek review thereof by certiorari*, and "For this court to find otherwise would send a message to boards of education that they may simply ignore the decisions of a review panel board." *Id.*

Therefore, Petitioner could have easily anticipated the Supreme Court of Alabama's Opinion in this case. Both the employees in *Hughes v. Britnell, supra*, and the employer in *Hardy v. Birmingham Board of Education, supra*, were told that they would be bound to the applicable

employee review panel decision absent a successful petition for writ of certiorari therefrom. Thus, even if Petitioner is attempting to fit the instant case within the *Herndon* exception, he cannot legitimately do so. Hence, this Court is without jurisdiction.

## II. THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S ARGUMENT, SINCE THE STATE COURT DECISION RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS

It is settled that this Court will not review a State court decision resting on an adequate and independent nonfederal ground even though the State court may have arguably also summoned to its support an erroneous view of federal law. *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed. 2d 298 (1973), 46 OGR 198, reh. denied, 414 U.S. 1138, 94 S.Ct. 884, 38 L.Ed. 2d 763, conformed to, 53 OGR 210, 544 P.2d 505, cert. denied, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed. 2d 386. Jurisdiction is lacking even "when the question of the existence of an adequate state ground [supporting the state court judgment] is debatable." *Stembridge v. Georgia*, 343 U.S. 541, 547-48 (1952); *McKinney v. City of Birmingham*, 409 U.S. 895 (1972) (dismissal of appeal due to brief being late is an adequate state ground); *McKinney v. Parsons*, 423 U.S. 960, 961 (1975) (Brennan, dissenting); *Radio Station WOW v. Johnson, supra* 65 S.Ct. 1475, 1480 (1945). Applying this principle to the instant case reveals that, in four separate respects, each of which will be discussed below, this Court lacks jurisdiction to consider the questions presented by Petitioner Smith.

### A. The Supreme Court Of Alabama Decision Was Expressly Based Upon A Nonfederal Ground

Petitioner incorrectly characterizes the Alabama Supreme Court's decision as being grounded upon resolution of a *federal* question. However, the Alabama Supreme Court's decision was based, instead, upon a

*state* ground, over which this court lacks jurisdiction. It is clear that the Supreme Court of Alabama's decision was based upon its interpretation and application of Alabama's own rules of practice, *Code of Alabama (1975)* § 41-22-20(k)(1), and *Alabama's* rules of collateral estoppel (issue preclusion); rules developed as a matter of Alabama law. Such rules concern the preclusive effect to be given to issues decided by an administrative agency, regardless of whether or not the issue precluded is relevant to a claim for relief arising from state law or federal law, or both. Put another way, the Supreme Court of Alabama Opinion with which Petitioner Smith is dissatisfied was arrived at through the Court's interpretation of *state* law and state rules of practice, and not 42 U.S.C. § 1983. "A state procedural rule which forbids the raising of federal questions at late stages in the case, *or by any other than a prescribed method*, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). As such, the Supreme Court of Alabama decision rests upon an adequate State ground, independent of any "federal question."

A state court decision denying relief because of a litigant's wrong choice of remedy or forum is an adequate *state* ground precluding this Court from reviewing a federal question. *Edelman v. California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Hammerstein v. Superior Court of California*, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135, reh. denied, 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637 (1951); *Copperwell Steel Co. v. Industrial Con.*, 324 U.S. 780, 65 S.Ct. 1006, 89 L.Ed. 1363 (1945). Consequently, this Court is without jurisdiction. *McCoy v. Shaw*, 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928); *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925); *Mellon Co. v. McCafferty*, 239 U.S. 134, 36 S.Ct. 94, 60 L.Ed. 181 (1915); *McQuade v. Trenton*, 172 U.S. 636, 19 S.Ct. 292, 43 L.Ed. 581 (1899). *See also*, 24 L.Ed. 2d 837, 849-53.

### B. The Supreme Court Of Alabama Is Presumed To Have Based Its Denial Of Rehearing On A State Ground

Second, the Petitioner's failure to raise the alleged "federal questions" presented in his petition for writ of certiorari until his application for rehearing to the Supreme Court of Alabama, combined with the fact that the Supreme Court denied rehearing without opinion or other comment, effectively renders the Supreme Court of Alabama decision to be a judgment based upon an adequate state ground. *Radio Station WOW v. Johnson, supra.* This is because a state court's denial of rehearing, even when issued without opinion and without any comment as to the reasons for the denial, is, unless it can be affirmatively shown otherwise, assumed by this Court to have been due to a procedural deficiency. *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945).

In this regard it is important to note that the burden of persuasion rests squarely upon the shoulders of Petitioner Smith to convince this Court that the denial of rehearing below was caused by reasons exclusive of his having first presented the purported federal question in his application for rehearing. Has Petitioner Smith sufficiently discharged this burden? No. Indeed, Petitioner has made no showing whatsoever in this respect. Therefore, under the assumption mandated by *Bailey v. Anderson, supra,* since the Supreme Court of Alabama denial of rehearing is grounded upon the adequate state ground of procedural deficiency, this Court is without jurisdiction to review the Alabama Supreme Court's Opinion.

### C. The Trial Court's Decision Was Also Based Upon The Limitations Period Lapsing

Moreover, the trial court's judgment was based upon yet another adequate state ground, independent of the alleged "federal" question presented in the *Petition.* Specifically, the trial court concluded that Petitioner's claim for relief under 42 U.S.C. § 1983 was barred as untimely

under *Ala. Code* § 6-2-38 (1975). In its *Memorandum Opinion*, granting summary judgment, the Circuit Court of Dale County, Alabama opined as follows:

> "The claims brought by Plaintiff Smith under 42 U.S.C. § 1983 are those stated in his Amendment to Complaint. The Court finds that the Section 1983 claims made in the Amendment to Complaint are barred by the applicable two-year statute of limitations. It is the law in Alabama that a claim brought under Section 1983 must be brought within two years of the occurrence upon which the claim is based. *Holland v. Barton*, 600 So. 2d 233, Ala. LEXIS 1147 (Ala. 1992); *Free v. Granger*, 887 F.2d 1552, n.1 (11th Cir., 1989); *Jones v. Preuit & Mauedin*, 876 F.2d 1480 (11th Cir. 1989). Inasmuch as the Amendment to Complaint was filed on November 8, 1993 concerning a termination which occurred on August 31, 1991, the Court finds that the claims submitted under Section 1983 are barred by the applicable two-year statute of limitations period.
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> "While the Plaintiff might, but did not, argue that the Section 1983 claims "relate back" to the State claims made in the original Complaint on August 25, 1993, the Court finds that there was no relation back between the Federal Constitutional claims made in the Amendment to Complaint and the breach of contract and other claims brought in the original Complaint. Therefore, Counts IV – VII of the Amendment to Complaint are dismissed as being not timely filed."
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> C-1802-03.[2]

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[2] Federal law dictates when a Section 1983 action accrues. However, *state* law, specifically, Rules 15(c) and 9(h), Ala. R. Civ. P. (*see* Appendices C & D), controls whether or not a new count, against new defendants, in an amended complaint, such as the

Thereafter, on appeal to the Court of Civil Appeals, both the Petitioner and Respondents argued whether or not this statute of limitations ground for the trial court's judgment was erroneous. *See* Appendix H, at H-2. The Court of Civil Appeals, having concluded that the trial court was correct in finding Petitioner's Section 1983 claim to be subject to issue preclusion, found it unnecessary to reach the statute of limitations and other grounds relied upon by the trial court. The Supreme Court of Alabama granted review of the Court of Appeals decision by certiorari. In their brief to the Supreme Court of Alabama, the Respondents repeated their statute of limitations argument. *See* Appendix G. However, *Petitioner* did *not*, in his briefs to the Supreme Court of Alabama, attack the trial court's judgment insofar as it was grounded upon the statute of limitations bar.

A state court judgment denying relief as being barred by a state statute of limitations is an adequate state ground, precluding this Court from reviewing a federal question. *Wood v. Chesborough*, 288 U.S. 672, 33 S.Ct. 706, 57 L.Ed. 1018 (1913); *Rogers v. Jones*, 214 U.S. 196, 29 S.Ct. 635, 53 L.Ed. 965 (1909); *Elder v. Wood*, 208 U.S. 226, 28 S.Ct. 263, 52 L.Ed. 464 (1908); *Seneca Nation v. Christy*, 162 U.S. 283, 16 S.Ct. 828, 40 L.Ed. 970 (1896). *See also* Jeffery F. Ghent, *Noncompliance With State Procedural Rule As Constituting 'Adequate State Ground' For Denial Of Relief So As To Preclude Supreme Court Review Of Federal Question*, 24 L.Ed. 2d 837, 844-45.

Thus, the case at bar fits squarely within this Court's ruling in *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed. 2d 298 (1973), 46 OGR 198, reh. denied, 414 U.S. 1138, 94 S.Ct. 884, 38 L.Ed. 2d 763, conformed to, 53 OGR 210, 544 P.2d 505, cert. denied, 426 U.S. 935, 96

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Section 1983 claim, "relates back" to the original complaint (or whether or not the Alabama two-year statute period is tolled.) *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Ortiz v. City of Imperial*, 884 F.2d 1312 (9th Cir. 1989); *Herman v. City of Chicago*, 870 F.2d 400, 403 (7th Cir. 1989).

S.Ct. 2648, 49 L.Ed. 2d 386. Therein this Court correctly noted that the trial court's judgment may have been based, not only upon resolution of a federal question, but also upon a state statute of limitations bar. *Id*, at 101-02. This Court also noted that the petitioner therein may have waived his right to challenge the correctness of the trial court's ruling concerning the statute of limitations, by not attacking such ruling as part of his appeal before the state's appellate courts. *Id*, at p. 101-02. Accordingly, this Court refused to render an advisory opinion on the federal question presented, since the trial court's judgment could have been based on an adequate, independent state ground. On further proceedings in the Oklahoma appellate court, this Court's lack of jurisdiction was confirmed. 544 P.2d 505.

Likewise, in the in tant case, the trial court found Petitioner's claim under 42 U.S.C. § 1983 to be untimely under Alabama's applicable two-year statute of limitations. Such finding is an adequate state ground, not dependent upon resolution of the purported "federal" questions presented by Petitioner to this Court. Also, Petitioner's failure to renew, before the Supreme Court of Alabama, his challenge to the trial court's statute of limitations ground for entry of summary judgment, constitutes another state ground for the judgment below. Therefore, Respondents respectfully submit that this Court lacks jurisdiction to consider the Petition herein.[3]

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[3] In their answers to the complaint and amended complaint, the Respondents also raised the defense of laches. C-056; C-1769. Although the trial court and Alabama's appellate courts found it unnecessary to reach the laches issue (C-1797), laches provides yet another potential adequate state ground for the trial court's judgment. In *Hughes v. Britnell*, 554 So. 2d 1041, 1042 (Ala.Civ.App. 1989), *cert. denied*, 596 So. 2d 56 (1989), the Alabama Court of Civil Appeals held that an employee's suit was barred by the doctrine of laches, because the employee waited 18 months after an employee review panel's decision to file suit.

### D. The Trial Court's Decision Was Also Justified By Petitioner's Failure To Timely Oppose Respondents' Motions For Summary Judgment

Even if this Court were, on the basis of the so-called "federal" questions presented, to vacate or reverse the Supreme Court of Alabama decision, thereafter Alabama's appellate courts would review other adequate state grounds supporting the trial court's entry of summary judgment, grounds the consideration of which were pretermitted by the Alabama Court of Civil Appeals. One of such grounds is that, under Rule 56(c) of the Alabama Rules of Civil Procedure (Ala. R. Civ. P.), the trial court's entry of summary judgment was justified, since the Petitioner failed to timely file substantial admissible evidence opposing the Respondents' motions for summary judgment. In other words, there presently exists an adequate state ground (Petitioner's failure to timely oppose the summary judgment motions), independent of the alleged "federal" question presented to this Court, upon which the trial court based its decision, and which Alabama's appellate courts have so far found it unnecessary to review, but, if necessary, would almost certainly affirm. Therefore, this Court should not devote its valuable resources to reviewing the question presented by Petitioner.

In Alabama's courts, it is axiomatic that if there are any grounds which support the result of the trial court judgment, then that judgment will be affirmed by Alabama's appellate courts, even if the trial court based its decision on different, erroneous grounds. *Bank of Southeast v. Keslin*, 380 So. 2d 826, 830 (Ala. 1980); *City of Birmingham v. Community Fire District*, 336 So. 2d 502 (Ala. 1976); *Boyd v. Brabham*, 414 So. 2d 931, 933 (Ala. 1982) ("if the trial court reaches the correct result, it is immaterial that the wrong reason may have been given"); *McMillan, Ltd. v. Warrior Drilling and Engineering Co., Inc.*, 512 So. 2d 14, 25-26 (Ala. 1986) (on rehearing).

As noted above, pursuant to Rule 56, Ala. R. Civ. P. (set forth as Appendix B to this brief), the Respondents filed motions for summary judgment. C-111-12; C-179. These motions were supported by affidavits, College records, medical records, and other evidence, demonstrating that Petitioner's employment was terminated only due to Petitioner's misconduct, and not for any other reason. C-113-900; C-1722-25.

Although Petitioner Smith, as the non-moving party, was not strictly required *per se* to respond to the Respondents' motions for summary judgment, Alabama's appellate courts have frequently reminded litigants that a failure to respond may be perilous. *See*, for example, *Harold Brown Bldrs., Inc. v. Jordan Co.*, 401 So. 2d 36 (Ala. 1981). The party opposing summary judgment must file substantial evidence before the date when the motion is heard. *Guess v. Snyder*, 378 So. 2d 691 (Ala. 1979); *Stallings v. Angelica Uniform Co.*, 388 So. 2d 942 (Ala. 1980). This is because, a summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Alabama Aviation & Technical College*, 683 So. 2d 426, 432 (Ala.Civ.App. 1995), affirmed, 683 So. 2d 431 (Ala. 1996), quoting Rule 56(c)(3), Ala. R. Civ. P. As the Alabama Court of Civil Appeals observed, "When a party opposing a motion for summary judgment offers no substantial evidence to contradict that presented by the movant, the trial court must consider the movant's evidence uncontroverted." *Id.*, at 432, citing *Shows v. Gonnell Trucking Co.*, 631 So. 2d 1010 (Ala. 1994). *See Petition*, at p. B-7.

In such a case, Alabama's appellate courts are also constrained to the facts as they existed, and were not in dispute, as of the date the trial court considered the summary judgment motion. *Chatham v. CSX Transportation, Inc.*, 613 So. 2d 341 (Ala. 1993); *Southern Guaranty Ins. Co. v. First Alabama Bank*, 540 So. 2d 732 (Ala. 1989)

(appellate court reviewing summary judgment uses the same standard employed by the trial court); *Hughes v. Britnell*, 554 So. 2d 1041, 1042 (Ala.Civ.App. 1989), *cert. denied*, 596 So. 2d 56 (1989) ("on appeal from a grant of summary judgment, this court cannot consider facts not before the circuit court"), citing *Purves v. PPG Industries, Inc.*, 502 So. 2d 714 (Ala. 1987).

In this case, despite more than one continuance of the hearing on the Respondents' summary judgment motions, Petitioner did not timely oppose summary judgment at all. As the Court of Civil Appeals correctly opined, "Smith failed to offer evidence to contradict the factual evidence presented by the defendants. Therefore, our review is limited to the evidence presented by the defendants to determine whether the defendants were entitled to a judgment as a matter of law." *See Petition*, at pp. B-7-8.

Quite obviously, then, as of the date that the trial court entered summary judgment in favor of the Respondents, Petitioner had failed to file any evidence, much less substantial evidence, tending to prove that he had been fired because he made comments criticizing College officials or policies, in violation of his right to free speech. Thus, on this basis (Petitioner's failure to at least create a dispute of fact material to his Section 1983 free speech claim), the trial court's summary judgment was correct, regardless of whether or not Petitioner's Section 1983 claim was barred by Alabama's rules of issue preclusion. Therefore, under the principles discussed above, the trial court's judgment was proper, and appropriately affirmed by Alabama's appellate courts.[4] As such, the judgment

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[4] Moreover, Alabama's rules of practice are such that issues not properly argued in brief on appeal are waived. Rule 28(a)(5), Alabama Rules of Appellate Procedure, requires an appellant to include in his brief an argument which "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the

was justified by an adequate state ground, independent of the "federal" question presented in the *Petition*. Hence, this case is not now properly within this Court's jurisdiction. *Paschall v. Christie-Stewart, Inc., supra.*

## III. ALABAMA'S APPLICATION OF ITS RULES OF PRACTICE AND ISSUE PRECLUSION TO PETITIONER'S SECTION 1983 CLAIM WAS A VALID EXERCISE OF STATE AUTHORITY

Even if this Court were to conclude that it possessed jurisdiction to consider the questions presented in the Petition, the Argument presented by Petitioner misstates or misconstrues what occurred in Alabama's courts. The argument and "questions presented" to this Court by Petitioner, at best, reveal a fundamental misunderstanding of what constitutes "exhaustion of administrative remedies," and worse, assail the Supreme Court of Alabama for rendering a decision never in fact made.

Petitioner's first "question presented" is, "May a state court . . . require litigants to exhaust inadequate administrative remedies as a condition precedent to filing a § 1983 claim?" *Petition*, at p. i. Apparently, by stating the question in such a manner, Petitioner would have this Court believe that the Supreme Court of Alabama, in its decision, answered the question "yes." Most any reasonably competent practitioner in constitutional law would know that a Section 1983 litigant would rarely, if ever, be *required* to avail himself of administrative remedies as a

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authorities, statutes and parts of the record relied upon." Rule 28(a)(5), A.R.A.P. *Bland v. State*, 277 Ala. 4, 166 So. 2d 735 (Ala. 1964). Petitioner's brief to the Alabama Court of Civil Appeals contained only brief mention (some six sentences), about the facts before the trial court, and made no argument in response to the Respondents' extended discussion, in brief (*see* Appendix H), that summary judgment was proper given Petitioner's failure to timely oppose summary judgment. Nor did the Petitioner even address this Rule 56 defense in his Brief to the Supreme Court of Alabama.

*condition precedent* to filing a Section 1983 claim in federal or state courts, and the Supreme Court of Alabama did *not*, in the decision below, hold otherwise. In the opening paragraph of his Argument, Petitioner states that, "The exhaustion requirement enunciated by the Alabama Supreme Court stands irretrievably inconsistent with the explicit disposition of the exhaustion issue in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) . . . [which held] that § 1983 litigants are guaranteed immediate access to judicial forums without having to exhaust administrative remedies." Petition, at p. 5. That statement brutally misrepresents what the Supreme Court of Alabama, in fact, held. Petitioner continues on thereafter to further falsely describe the Alabama Supreme Court's decision, by asserting that the Alabama Supreme Court forced him, "as a precondition to suit," to "exhaust" the "administrative procedure" by which a State two-year college employee may appeal his termination from nonprobationary employment to a three-person "employee review panel." The Supreme Court of Alabama required no such thing.

Rather, the Opinion of the Supreme Court of Alabama, when read within the context of the circumstances of the instant case, can only be reasonably construed to mean the following: (1) As a tenured State two-year college employee who had been fired, Petitioner could have exercised his own *discretion* as to whether or not to appeal the termination of his employment to an employee review panel. (2) Although not required to do so, if Petitioner chose to make such an appeal, then (and only then) he was bound by the "final and binding" decision of the employee review panel, unless he properly sought review of the panel decision in Alabama courts, consistent with Alabama's own rules of practice. (3) The only proper method for Petitioner to obtain state judicial review of the panel decision was by filing, in circuit court, a petition for writ of certiorari to the panel and its decision. *Petition*, at pp. A-6, A-9. (4) Had Petitioner, as part of his suit, appealed the review panel decision by petitioning for a

writ of certiorari, and included, as an additional count in his complaint, a claim for relief under 42 U.S.C. § 1983, then he could, if successful, have obtained all of the relief sought. *Petition*, at p. A-9. (5) Petitioner failed, in his complaint, to seek review of the review panel's decision. *Petition*, at p. A-9. (6) In considering claims for relief, whether or not grounded in whole or in part on Alabama or federal law, Alabama's courts properly may, and will, apply Alabama's rules of issue preclusion. *Petition*, at p. A-3. This includes applying the "elements for issue preclusion applicable to administrative hearings, as announced by [the Supreme Court of Alabama] in *Ex parte Shelby Medical Center, Inc.*, 564 So. 2d 63 (Ala. 1990)." *Petition*, at p. A-3. (7) Even though federal courts use the federal common law doctrine of collateral estoppel (which does not give preclusive effect to unreviewed agency decisions) in considering Section 1983 claims *brought in federal court*, Section 1983 claims brought in *Alabama's* courts are properly subject to Alabama's rules of issue preclusion, just like any other claim brought in Alabama's courts. *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). (8) The employee review panel's decision provides all of the elements necessary, under Alabama law, for application of issue preclusion to Petitioner's claims. *Petition*, at pp. A-3, A-9, B-8-10. (9) Petitioner could have easily avoided such issue preclusion, by successfully petitioning for a writ of certiorari (or, of course, by not appealing his termination from employment to an employee review panel, or possibly by bringing his Section 1983 claim in Federal court). However, since he did not, Petitioner, by his own actions, effectively "waived" the ability to avoid issue preclusion and relitigate the relevant issues, including his contention, made during the employee review panel hearing, that he was improperly fired for making remarks critical of education officials or policies (a contention which, if persuasive, would have mandated that the panel reverse the firing as having been impermissibly "arbitrarily unjust or for political or

personal reasons" – *see* Petition, at p. B-11). Petition, at pp. A-6, A-8, A-9, A-10.

With respect to issue preclusion, the Supreme Court of Alabama was imminently correct. A Section 1983 litigant does not have to pursue administrative remedies. Here, Petitioner was not required to avail himself of the opportunity to challenge his termination before the administrative body known as the "employee review panel." However, it is well established that a state court, in considering a Section 1983 claim, may apply its own rules of collateral estoppel and its own rules of practice. *Williams v. Georgia, supra.* This includes application of issue preclusion principles to the decisions of administrative bodies, so long as the rules of the particular state allow therefor. Consequently, Alabama court's have not erected an unconstitutional barrier to Section 1983 litigants obtaining full relief. Rather, Alabama's court's have simply enforced the state's own, perfectly valid, rules of practice. Thus, the predicament within which Petitioner now finds himself, is not a product of state court decisions violative of the Supremacy Clause, but instead, a direct product of Petitioner's own failure, through one of his five former attorneys, to follow Alabama's rules of practice.

Furthermore, Petitioner's argument in brief that he unfairly suffered summary judgment because the Supreme Court of Alabama denied him access to Alabama's courts until after he first exhausted administrative remedies (*see* Petition, at pp. i, 5, 11-12), if not deceptive, discloses a fundamental misunderstanding or misuse of the term "exhaustion of *administrative* remedies," at least to the extent such term is relevant to Section 1983 litigation. At pages 6-10 of the Petition, Petitioner presents a long list of cases, apparently to substantiate the statement, at page 5 of the Petition, to the effect that Section 1983 litigants "are guaranteed immediate access to judicial forums without having to exhaust administrative remedies."

The problem with Petitioner's statement is, first and foremost, that the stated principle refers only to the exhaustion of *administrative* remedies, and *not* to the availability or use of *judicial* remedies. Put another way, the principle refers to whether or not a litigant is required to avail himself of all *administrative* remedies available to him *before* he is able to obtain relief in a *judicial* forum. Thus, it has been stated that "Exhaustion of remedies is broadly stated as the withholding of judicial relief on a claim or dispute cognizable by an administrative body until the administrative process has run its course" *Gottschalk v. Hegg*, 89 S.D. 89, 92, 228 N.W.2d 640, 642 (1975), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1939). The doctrine does *not* in any manner include state rules of practice concerning the method or means by which a person may seek *judicial relief in a state court*. A state may, for example, as Alabama has done, lay down a rule of practice that persons desiring to obtain judicial review of an employee review panel decision must do so by means of a petition for a writ of certiorari, rather than a petition for a writ of mandamus. *Hughes v. Britnell, supra.*

Put another way, the doctrine of exhaustion of administrative remedies obviously relates only to one's having "used up," so to speak, the administrative remedies available, as distinguished from the method by which a person thereafter seeks *judicial* relief in Alabama's courts. Here, Petitioner exhausted the administrative remedy, which was the appeal to the employee review panel. Indeed, the administrative remedy was exhausted when the review panel issued its decision. Since Alabama's courts did not enter or affirm summary judgment on the basis of any actual or alleged non-exhaustion of administrative remedies, Petitioner's Argument is devoid of merit, and the Petition should be denied.

Respondents respectfully request the Court to also note that the Petitioner's Argument contains a number of misstatements of caselaw. Respondents shall not address

herein each of those misstatements, but shall discuss below the more significant of them.

For example, Petitioner erroneously asserts that, under the decisions below, he could not have been awarded attorneys fees and expenses, to which he was entitled under 42 U.S.C. § 1988, because the Fair Dismissal Act limited the relief available to a sharing of expenses between the employer and employee. *See Petition,* at pp. 11-12. However, the Supreme Court of Alabama does *not* purport to restrict the relief which would have been available to Petitioner. Nor does the Fair Dismissal Act (at § 36-26-106 of the Alabama Code), which authorizes sharing of the three employee review panel members' expenses, purport to limit the relief which may later be available to a prevailing Section 1983 claimant under 42 U.S.C. § 1988.

Petitioner further asserts that, under *Ex parte Averyt,* 487 So. 2d 912 (Ala. 1986), the circuit court "did not have authority to decide the constitutional issues implicated." *Petition,* at p. 13. Petitioner's absurd contention in this regard is explicitly contradicted by the Supreme Court of Alabama decision below. *See Petition,* at pp. A-9 ("the circuit court could have adequately determined the constitutional issues raised by [Petitioner]"); A-10.

Furthermore, it should be noted that Petitioner's assertion in this regard, and the argument at pages 12-14 of the Petition, is based upon Petitioner's own misinterpretation of *Averyt, supra,* which the Alabama Court of Civil Appeals correctly distinguished from the instant case. *See Petition,* at p. B-11. Although the Petitioner now attempts to construct a conflict between the decision below and *Averyt* (an alleged conflict of *State* law, with which this Court is not concerned), and build thereon a contention that the Supreme Court of Alabama has "retroactively" imposed "a fatal exhaustion requirement," Petitioner conveniently neglects to inform this Court that he never once mentioned, in his principle brief to the Supreme Court of Alabama, the holding in *Averyt,* even though he argued *Averyt* to the Alabama Court of Civil

Appeals. Consequently, the Supreme Court of Alabama was not called upon to consider the matter of which Petitioner now complains, and thus, cannot belatedly be put in error regarding such. Moreover, the supposed conflict between the decision below and *Averyt*, which Petitioner imagines to exist, and the supposed surprise and "Catch-22" of which Petitioner now complains, are, in reality, not the product of a conflict between judicial decisions, but actually the result of Petitioner's own failure to properly seek relief in Alabama's courts consistent with Alabama's rules of practice, as outlined some four years before Petitioner's suit, in *Hughes v. Britnell*, 534 So. 2d 1041, 1042-43 (Ala. Civ. App. 1989), *cert. denied*, 596 So. 2d 56 (1989). *See* Part I herein.

Also, Petitioner is hardly in a position to complain (at pp. 2 and 13 of the Petition) about the panel, which reviewed his termination and free speech assertions, being composed of non-lawyers, because *Petitioner himself* unilaterally and voluntarily selected a person to be a member of the panel who was not an attorney. Under the Procedure, Petitioner was free to choose virtually anyone. He could have chosen an attorney, or even a constitutional law professor. He chose not to. In other words, Petitioner's argument that he could only have received a fair hearing from a panel of lawyers, is betrayed by his own conduct in choosing a panel member without legal training.

## IV. THE ISSUES PRESENTED BY PETITIONER TO THIS COURT DO NOT WARRANT THIS COURT'S ATTENTION, SINCE THEY RELATE ONLY THE TO PETITIONER AND WHATEVER FEW OTHER LITIGANTS WHOSE COUNSEL MIGHT CHOOSE TO IGNORE ALABAMA'S RULES OF PRACTICE FOR SEEKING JUDICIAL REVIEW OF AGENCY DECISIONS

As discussed elsewhere in this Opposition, the so-called "Catch-22" procedural predicament in which the Petitioner supposedly finds himself was not caused by

Alabama's enforcement of its rules of practice (by which judicial review of agency decisions is to be obtained through means of a circuit court petition for writ of certiorari directed to the agency), but rather, by Petitioner's own failure, through one of his several former attorneys, to avail himself of the procedural mechanism through which Petitioner could have sought review of the employee review panel's decision and fully litigated his alleged claim under 42 U.S.C. § 1983. Put another way, although Alabama's courts held Petitioner's Section 1983 claim to be subject to issue preclusion (collateral estoppel), and Petitioner now attempts to erroneously mischaracterize the results of his failure to pursue available judicial review as an "exhaustion of administrative remedies" requirement, Petitioner would have been able to fully litigate, in Alabama's courts, his Section 1983 claim if he had merely filed, in the trial court, a petition for writ of certiorari. Thus, in reality, this case does not even present a substantial federal question, but instead, demonstrates a simple failure of a plaintiff to follow a State rule of judicial procedure.

Consequently, the "questions presented" by Petitioner are questions improbable of significantly affecting the course of civil rights litigation in this nation. Rather, only the Petitioner will be affected. "The [Supreme] Court [of the United States] will seldom 'grant certiorari to correct individual injustices.' " R. Stern et al., *Supreme Court Practice*, sec. 6.30, at p. 353 (7th ed. 1993), quoting S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 615 (1984). Therefore, the petition for writ of certiorari should not be granted.

## CONCLUSION

For all of the reasons discussed above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX A

* * *

**§ 1257. State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

* * *

## APPENDIX B

* * *

### RULE 56. SUMMARY JUDGMENT

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.**

(1) *Form of Motion and Statement in Opposition Thereto.* The motion shall be supported by a narrative summary of what the movant contends to be the undisputed material facts; that narrative summary may be set forth in the motion or may be attached as an exhibit. The narrative summary shall be supported by specific references to pleadings, portions of discovery materials, or affidavits and may include citations to legal authority. Any supporting documents that are not on file shall be attached as exhibits. If the opposing party contends that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same

manner as is provided herein for a summary of undisputed material facts.

(2) *Time.* The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing.

(3) *Judgment.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is

not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him.

**(f) When Evidentiary Matter Is Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**(dc) District Court Rule.** Rule 56 applies in the district courts except that the references to thirty (30) days and ten (10) days are reduced to fourteen (14) days and seven (7) days, respectively.

* * *

# APPENDIX C

* * *

## RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

* * *

**(c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, except as may be otherwise provided in Rule 13(c) for counterclaims maturing or acquired after pleading, or

(3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party, or

(4) relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h).

* * *

# APPENDIX D

* * *

## RULE 9. PLEADING SPECIAL MATTERS

* * *

**(h) Fictitious Parties.** When a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when that party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

* * *

# APPENDIX E

## RULE 1. SCOPE OF RULES

* * *

(c) **Construction.** These rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

* * *

# APPENDIX F

* * *

## RULE 28. BRIEFS

**(a) Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;

(2) A statement of the case (The statement shall first indicate briefly the nature of the case, the course of proceedings and its disposition in the court below);

(3) A statement of the issues presented for review;

(4) A full statement of facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e));

(5) An argument (The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on); and,

(6) A short conclusion stating the precise relief sought.

(7) A brief on appeal to the Court of Criminal Appeals should also contain a list of each and every ruling by the trial court adverse to the defendant on

whose behalf the appeal is taken. Such list need only refer to the pages of the record on appeal where such rulings occur. See Form 23.

* * *

**APPENDIX G**

IN THE SUPREME COURT OF ALABAMA

Appeal No. 1941820

---

ALTON WAYNE SMITH,

Plaintiff - Petitioner,

v.

ALABAMA AVIATION AND
TECHNICAL COLLEGE, et al.,

Defendants - Respondents.

---

CIRCUIT COURT OF DALE COUNTY

---

# BRIEF OF DEFENDANTS - RESPONDENTS SHIRLEY WOODIE, FRED GAINOUS, AND JOHN FERGUS

---

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## C. MR. SMITH'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Another alternative ground for this Court to affirm the judgment below is that Mr. Smith's Section 1983 claims were untimely, and barred by the applicable statute of limitations. In other words, even if Mr. Smith's claims under 42 U.S.C. § 1983 were not subject to collateral estoppel, they were nevertheless untimely, and therefore properly disposed of through summary judgment.

### 1. The Amended Complaint Was Untimely

Although the original Complaint was filed on August 25, 1993, the "Amendment to Complaint" was not filed until November 8, 1993.

The applicable statute of limitations period is two years. *Holland v. Barton,* Ala. Lexis 1147 (Ala. 1992); *Free v. Granger,* 887 F.2d 1552, n. 1 (11th Cir. 1989); *Jones v. Preuit & Mauldin,* 876 F.2d 1480 (11th Cir. 1989) (applying the then-applicable, and since-repealed, one year limitations period).

Federal law, rather than Alabama law, dictates when a Section 1983 action accrues. Such law establishes that an action growing out of an employment termination accrues on the date of the employer's action causing the termination (rather than any subsequent date on which the employment ceased). *Delaware State College v. Ricks,* 449 U.S. 250 (1980) (civil rights action by a tenured college professor denied tenure accrued when the employer gave notice to the professor of its decision); *Chardon v. Fernandez,* 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1980);

*DeLeon v. Rubero*, 820 F.2d 18 (1st Cir. 1987); *Conde v. Beltran Pena*, 793 F.Supp. 33 (D. Puerto Rico 1992).

Applying the above principles to the instant case, on August 28, 1991 Mr. Smith was notified that his employment was terminated. Consequently, any Section 1983 cause of action which Mr. Smith might have had concerning his termination from employment accrued on August 28, 1991. The two-year limitations period therefore expired on August 27, 1993. Since the claims for relief pursuant to 42 U.S.C. § 1983, first contained within the Amended Complaint, were not filed until November 8, 1993, the Circuit Court properly ruled them to be barred, as untimely.

* * *

**APPENDIX H**

IN THE ALABAMA COURT OF CIVIL APPEALS

Appeal No. 294-0449

---

ALTON WAYNE SMITH,

Plaintiff - Appellant,

v.

ALABAMA AVIATION AND TECHNICAL COLLEGE, et al.,

Defendants - Appellees.

---

APPEAL FROM THE CIRCUIT COURT
OF DALE COUNTY

---

# BRIEF OF DEFENDANTS – APPELLEES ALABAMA AVIATION AND TECHNICAL COLLEGE, SHIRLEY WOODIE, FRED GAINOUS, AND JOHN FERGUS

---

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## IV. ARGUMENT

### A. Summary Judgment Was Proper Given Mr. Smith's Failure To Timely File Substantial Evidence Creating A Controlling Dispute Of Material Fact, As Required By Rule 56, A.R.C.P.

In his brief to this Court, Mr. Smith asserts that this Court "should presume that Mr. Smith was terminated because of his exercise of his constitutional right to free speech. "*Brief of Appellant Alton Wayne Smith,* at p. 5 ("Statement of Facts").[2] It is fundamental, of course, that

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[2] The only apparent basis for such a remarkable assertion is contained within the three sentences immediately preceding the assertion, within Mr. Smith's Statement of Facts. Therein, Mr. Smith states, "This Statement of Facts is brief, as the facts has very little to do with the trial Court's grant of summary judgment. In particular, the summary judgment was *not* based on any suggestion by the trial Court that Mr. Smith had failed to adduce evidence that his termination was in violation of his federal constitutional rights, including his right to free speech under the First Amendment. Nor was the summary judgment based on any suggestion that Woodie and Fergus had not personally violated Mr. Smith's constitutional rights." *Brief of Appellant,* at p. 5.

Mr. Smith obviously misconstrues the significance of the Circuit Court's not specifically commenting on the facts or evidence. At most, the absence of such a comment indicates that, in light of the Defendants' legal defenses, it was *unnecessary* to reach the question of whether factual disputes existed. In other words, summary judgment is appropriate, even if there is a dispute of material fact, when any such factual disputes are not *controlling* to the disposition of the summary judgment motion. Accordingly, even if Mr. Smith had timely

for purposes of both Rule 56 (A.R.C.P.) motions and appeals from grants of summary judgment, the *facts* are established in accordance with, and *only* in accordance with, the procedures set forth within Rule 56. In the instant case, the Defendants-Appellees supported their motion for summary judgment with considerable evidence demonstrating the facts set forth within Part I of this Brief. Mr. Smith failed to timely (or even belatedly) file substantial admissible evidence in opposition thereto. Consequently, the only items to be "presumed" are those facts described in Part I and Mr. Smith's failure to minimally demonstrate an abridgement of his right to free speech.

Specifically, it is well established that the presence or absence of *controlling disputes of material fact must be ascertained as of the time the motion for summary judgment is taken under consideration,* and *not later.* Of course, the non-moving party (here, Mr. Smith) cannot merely rest upon his pleadings, but must respond to the motion for summary judgment with substantial admissible evidence in opposition, demonstrating a dispute of material fact. If the non-moving party fails to timely present such admissible evidence, then the Court is left with no alternative but to consider that evidence uncontroverted, and may properly enter summary judgment. *Eason v. Middleton,* 398 So.2d 245 (Ala. 1981); *Denniston & Co. v. Jackson,* 468

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opposed summary judgment with factual evidence tending to support his claims, administrative preclusion/collateral estoppel, immunity from suit, and other legal defenses relied upon by the trial Court still mandated the grant of summary judgment. Furthermore, as discussed, infra, Mr. Smith *Did not* effectively dispute the facts presented by Defendants.

So.2d 170 (Ala. Civil. App. 1985). Although the non-moving party is not strictly required *per se* to respond to a motion for summary judgment, Alabama's Appellant [sic] Courts have frequently reminded litigants that a failure to respond may be perilous. *See,* for example, *Harold Brown Bldrs., Inc. v. Jordan Co.,* 401 So.2d 36 (Ala. 1981). When must the response with substantial evidence be submitted? The caselaw is clear that it must be filed *before* the date when the motion is heard. Evidence filed after submission of the motion is too late, and cannot be considered. *Guess v. Snyder,* 378 So.2d 691 (Ala. 1979); *Stallings v. Angelica Uniform Co.,* 388 So.2d 942 (Ala. 1980); *Engel Mtg. Co. v. Triple K Lumber Co.,* 56 Ala. App. 337, 321 So.2d 679 (1975).

Applying these principles to the instant case yields the result that there was no evidence demonstrating a violation of Mr. Smith's constitutional rights before the trial Court as of the date summary judgment was entered. Mr. Smith filed absolutely nothing in response to the Defendants' motion prior to the date it was taken under submission. Hence, the facts as contained in Defendants' motion were uncontroverted. Mr. Smith's post-judgment Rule 59 motion attempt to dispute such facts could not be considered by the Circuit Court. Consequently, summary judgment was proper. Furthermore, although this Appellate Court is not constrained by the Circuit Court's reasoning, it is constrained to the facts as they existed, and were not disputed, as of the date summary judgment was entered. *Chatham v. CSX Transportation, Inc.,* 613 So.2d 341 (Ala. 1993).

Of course, in the Court below Mr. Smith contended, in his Rule 59 motion, that he did not have a fair opportunity to submit evidence opposing summary judgment because he did not receive adequate notice of the July 26, 1994 hearing. Yet, Mr. Smith actually had much more than ample time to respond to the summary judgment motion, and by his own lack of action, Mr. Smith suffered to his peril. Specifically, the motion for summary judgment was filed as early as December 20, 1993. Despite Mr. Smith's failure to promptly respond, the Circuit Court eventually went on to schedule the motion for a hearing. Indeed, continuances of the hearing were granted at Mr. Smith's request. For example, on March 7, 1994, the trial Court set the motion for a hearing on March 14, 1994, but on March 9, 1994 continued the hearing at Mr. Smith's request. Eventually, on June 21, 1994 the Court set the hearing for July 25, 1994, (even though Mr. Smith's counsel later indicated that he did not receive such notice). Quite obviously, Mr. Smith should have promptly filed substantial evidence opposing the motion back in December of 1993, or, at a minimum, after the March 7, 1994 notice. Indeed, when one takes "a step back" and looks at the entirety of the relevant proceedings, Mr. Smith's Rule 59 argument that he was denied a fair opportunity to respond appears even weaker. Mr. Smith had all of the time between December 20, 1993 and August 11, 1994 in which to oppose summary judgment. Mr. Smith had *eight months*! Did Plaintiff oppose the motion within the eight months? No. Did Plaintiff file *anything whatsoever* in opposition during that long period of time? No. Under these circumstances – with eight months to contradict the motion – despite his counsel's allegedly not receiving

notice of the July 25th hearing, Mr. Smith still had more than ample and fair opportunity to avoid summary judgment. Mr. Smith failed to act, at his own peril. Consequently, the lack of notice, if any, regarding the July 25, 1994 hearing was not prejudicial, and does not overcome the above discussed principles justifying, and mandating, the summary judgment for Defendants.[3]

Finally on this point, even if the Circuit court were alleged on this appeal to have committed legal error in denying Mr. Smith's Rule 59 motion, and examined whether or not there belatedly existed a dispute of material facts *as of the date the Rule 59 Motion was denied* (instead of the date the summary judgment was entered), it is nevertheless *still* apparent that the trial court acted correctly in denying the Rule 59 Motion *since no dispute of material facts existed even as of such late date.*

Specifically, if one examines the Record, particularly at pages 1811-1882 thereof, he *still finds no admissible*

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[3] It may be anticipated that Mr. Smith may argue, in reply brief, that somehow a dispute of material fact was created by the Defendants merely because they filed with the Circuit Court a copy of the administrative hearing panel proceedings record. Such an argument, however, not only ignores the burden placed upon Mr. Smith and procedures required of him by Rule 56, A.R.C.P., and ignores the precise manner in which Defendants supported their Summary Judgment motion, but would result in the absurdity of rendering Rule 56 a nullity. Indeed such an approach would mean that in any and all cases in which there had been a prior administrative proceeding, there would always be a dispute of fact, and therefore, summary judgment could never be obtained, regardless of the opposing party's failure to respond to a Rule 56 motion. Quite obviously, no such result was intended by the Alabama Rules of Civil Procedure.

*evidence disputing* the facts supporting the Defendants' summary judgment motion or demonstrating abridgement of Mr. Smith's right to free speech. At pages 1811-1882 of the record, the Court may find just what Mr. Smith filed with the Circuit Court in response to the grant of summary judgment, and in support of his Rule 59 motion.[4] Do these Record pages contain any authenticated, admissible items of evidence creating a dispute of material fact? No, not a shred. Instead, at pages 1811-1812 is a "Motion To Vacate Or Set Aside Judgment Or, In The Alternative, For New Trial"; at pages 1813-1834 is a "Memorandum Brief In Support Of Plaintiff's Motion To Vacate Or Set Aside Judgment Or, In The Alternative, For New Trial"; at pages 1835-1836 is an "Affidavit of John B. Crawley" (regarding his not receiving the June 24, 1994 Order); at pages 1837-1838 an "Affidavit of Lonneke Muller" (regarding such lack of receipt by counsel's secretary); at pages 1839-1840 the Case Action Summary; and at pages 1841-1875 various *unauthenticated* items of correspondence and other documents and hearsay newspaper articles.[5] There simply is *no affidavit* of Mr. Smith, or anyone else, *verifying the unauthenticated documents or offering any admissible evidence* of abridgement of free

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[4] One also examines this portion of the Record since Mr. Smith, in his brief to this Court, contends that such is the place to look for proof that summary judgment was improper. Mr. Smith states, "At the same time, Smith submitted a brief and evidence showing that summary judgment was not proper. C-1813 to C-1875." *Brief of Appellant Alton Wayne Smith*, at p. 3.

[5] At pages 1876-1877 and 1878-1880 are a "Motion To Amend Complaint" and "Second Amendment To Complaint" respectively.

speech, any admissible evidence contradicting the Defendants proof of facts, or any other substantial admissible evidence[6] whatsoever. Therefore, on this basis alone, without even having to reach the legal defenses discussed in the remaining pages of this brief, the judgment below should be affirmed.

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[6] Because this case was filed after June 11, 1987, the substantial evidence rule applies. *Code of Alabama* (1975), §12-21-12. "Substantial evidence" is defined as "Evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founder's Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala. 1989); *Ballew v. Charter Realty ERA*, 603 So.2d 877 (Ala. 1992). Furthermore, for a claim to go to a jury, a Plaintiff must put forth substantial evidence of *each and every* element of the cause of action.

# APPENDIX I

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§ 6-2-38. Commencement of actions – Two years.

(a) An action by a representative to recover damages for wrongful act, omission, or negligence causing the death of the decedent under Sections 6-5-391 and 6-5-410 must be commenced within two years from the death.

(b) All actions by common carriers of property subject to Chapter 3 of Title 37 for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after.

(c) For recovery of charges, action shall be begun against common carriers of property by motor vehicles subject to this article within two years from the time the cause of action accrues and not after, except as provided in subsection (d) of this section; provided, that if claim for the overcharge has been presented in writing to the carrier within the two year period of limitation, said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before the expiration of the two-year period of limitation in subsection (c) of this section, a common carrier by motor vehicle subject to Chapter 3 of Title 37 begins action under subsection (c) of this section for recovery of charges in respect of the same transportation service or, without beginning action, collects charges in respect of that service, said period of limitation shall

be extended to include 90 days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purpose of subsections (b) through (f) of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

(f) The term "overcharges" as used in subsections (b) through (e) of this section shall mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the public service commission.

(g) Any action brought under Section 25-5-11(b) must be brought within two years of such injury or death.

(h) All actions for malicious prosecution must be brought within two years.

(i) All actions for seduction must be brought within two years.

(j) All actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation, must be brought within two years.

(k) All actions of libel or slander must be brought within two years.

(l) All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.

(m) All actions for the recovery of wages, overtime, damages, fees, or penalties accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties must be brought within two years.

(n) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant, or employee under the doctrine of respondeat superior must be brought within two years.

(o) All actions commenced under Section 6-5-411 to recover damages for injury or damage to property of a decedent must be brought within two years.

(p) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence an action again within one year from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommenced within one year.

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